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REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. XXIX.

ALBANY:

W. C. LITTLE & Co., LAW BOOKSELLERS.

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DURING THE YEAR 1859.

FIRST JUDICIAL DISTRICT.

- CLASS 1. JAMES J. ROOSEVELT.*
" 2. HENRY E. DAVIES.
" 3. THOMAS W. CLERKE.
" 4. JOSIAH SUTHERLAND.
" " DANIEL P. INGRAHAM.

SECOND JUDICIAL DISTRICT.

- " 1. SELAH B. STRONG.†
" 2. JOHN A. LOTT.*
" 3. JAMES EMOTT.
" 4. JOHN W. BROWN.

THIRD JUDICIAL DISTRICT.

- " 1. IRA HARRIS.*
" 2. WILLIAM B. WRIGHT.
" 3. GEORGE GOULD.
" 4. HENRY HOGEBOOM.

FOURTH JUDICIAL DISTRICT.

- " 1. CORNELIUS L. ALLEN.†
" 2. AMAZIAH B. JAMES.*
" 3. ENOCH H. ROSEKRANS.
" 4. PLATT POTTER.

JUSTICES OF THE SUPREME COURT.

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" 3. WILLIAM F. ALLEN.
" 4. JOSEPH MULLIN.

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" 3. RANSOM BALCOM.
" 4. WILLIAM W. CAMPBELL.

SEVENTH JUDICIAL DISTRICT.

- " 1. THERON R. STRONG.*
" 2. HENRY WELLES.
" 3. ERASMUS DARWIN SMITH.
" 4. THOMAS A. JOHNSON

EIGHTH JUDICIAL DISTRICT.

- " 1. MARTIN GROVER.†
" 2. BENJAMIN F. GREENE.*
" 3. RICHARD P. MARVIN.
" 4. NOAH DAVIS, JUN.

LYMAN TREMAIN, *Attorney General*.

* Presiding Justice.

† Sitting in the Court of Appeals.

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CASES
 IN
 Law and Equity
 IN THE
 SUPREME COURT
 OF THE
 STATE OF NEW YORK.

VAN DEUSEN and others *vs.* YOUNG.

The provisions of the statute "Of trespass on lands," (2 *R. S.* 338, § 1,) were not intended exclusively for the benefit of persons having a present estate in possession.

Remaindermen in fee may maintain an action, under the statute, for an injury to the inheritance, by cutting timber; and the fact that there is a subsisting estate for life in another person presents no insuperable obstacle to such action.

What cases, upon the merits, or judged by the intrinsic character of their facts, are embraced within the statute.

Where a contract for the sale and purchase of land is made, under which the purchaser enters into possession of the premises, and cuts wood and timber thereon, and the contract is subsequently terminated without a consummation by deed, and it does not appear whether it was put an end to by mutual consent, or mutual fault, or which party committed the fault, the parties are remitted to their original rights, and an action may be maintained, under the statute, for the injuries done to the inheritance by the purchaser.

An objection on account of the nonjoinder of a person as plaintiff, must be presented by demurrer or answer.

Joint owners of land, deriving their title from a common ancestor, together

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represent the estate which their ancestor had, in his lifetime; and for an injury to their common property, where the damage is common to all, they may maintain a joint action.

In an action for an injury to the inheritance, by cutting wood and timber, evidence of the comparative value of the premises with or without the wood and timber, is admissible as furnishing an appropriate criterion of damage, after a proper foundation has been laid by showing the acquaintance of the witness with that species of property.

THIS was an appeal by the defendant from a judgment rendered in February, 1856, in favor of the plaintiffs, upon the report of a referee. The plaintiffs are the devisees and heirs at law of Lawrence Van Deusen, late of Albany county, deceased, and the defendant was the vendee, under a contract of sale, of the farm of said Van Deusen. Such contract was made between the defendant and Mary Van Deusen as the executrix of her deceased husband, but there was in his will no power of sale conferred upon the executrix. Lawrence Van Deusen died in October, 1853, having first made a will by which he appointed his wife Mary executrix, and gave her a life estate in the premises, and devised the estate in remainder to his son, Lawrence Van Deusen, jun., one half thereof, and to his daughters, Mrs. Hungerford and Mrs. Hendrickson, the other half, to be equally divided between them. Mrs. Hendrickson died intestate and without issue, and her brothers and sister inherited her share of the farm. Soon after the death of the husband, and on the 31st of October, 1853, Mary Van Deusen, as executrix, contracted to sell the farm to the defendant for the price of \$3000, \$2000 payable on the 1st of May then next, and \$1000 to be secured by mortgage upon the premises. The deed was to be "a good and sufficient quit-claim deed for the conveying to him the fee simple of the said premises, free from all incumbrances except rents to accrue after the 1st of April, 1854, to S. Van Rensselaer." Lawrence Van Deusen, jun. one of the children, was cognizant of this contract—a subscribing witness thereto; and in reply to some question put to him at the time of the making of the contract, alleged that his mother had power to

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sell. No such authority, however, was given by the will. The contract further provided that the defendant should have *immediate possession* of the lower part of the house, and also privilege to do what work he might deem fit or necessary to be done on the farm, provided he could get possession thereof of one Adam J. Long, who held it under an article of agreement till the 1st of April, 1854. This the defendant succeeded in doing, and went into possession, began clearing a part of the premises, cut off the wood from a swale, to the extent of some 80 cords—there being but about six acres of wood land on the premises, originally, as claimed by the plaintiffs. On the 1st of May, 1854, when the deed was to be delivered, difficulties arose between the parties. The widow and executrix tendered a quit-claim deed, signed by herself and the children of Lawrence Van Deusen. The defendant objected to taking it, on the ground that there was a considerable amount of unpaid rent; that the premises were liable to be sold for an unpaid subscription by the deceased to the stock of a plank road company; that there were judgments unsatisfied of record against Lawrence Van Deusen, jun. which were a lien on the premises, and an unsettled bond executed by him, liable to be satisfied thereout. The widow then procured to be prepared and executed a warranty deed of the premises, and tendered the same; offered to indemnify the defendant against all liabilities and incumbrances, and assured him that the rent, (except a small portion which would be forthwith discharged) and the judgments, were paid. High words ensued between them; the defendant declined to accept the title or indemnity; the bargain fell through, and the defendant vacated the premises. The plaintiffs then brought this action to recover the damages resulting to the premises from the cutting of the wood and timber before referred to, and claimed to recover treble damages, under the provisions of the statute entitled "Of trespass on lands." The complaint contained two counts—the first charging the defendant with having cut down, carried off and destroyed certain trees

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of the plaintiffs of the value of \$500, growing and being upon the aforesaid premises in which (as alleged) the plaintiffs owned a vested estate in fee on the death of Mary Van Deusen, and with having taken and carried away the same and disposed thereof to his own use; the second alleging that on the 1st day of November, 1853, and afterwards, the defendant forcibly, and contrary to the provisions of the statute entitled "Of trespass upon lands," did cut down and carry off, without and against the leave and consent of the plaintiffs, the owners thereof, divers trees of the value of \$300, being and standing on the lands of the plaintiffs, known as the Lawrence Van Deusen farm, and also did girdle and despoil other trees standing and being on said lands, whereby the said farm belonging to the plaintiffs had been greatly damaged and lessened in value to the amount of \$500, whereby the defendant had forfeited treble the damages sustained by the plaintiffs, and they therefore claimed to recover \$2400, besides costs of the action. The defendant denied, substantially, the allegations of the complaint, and justified under the contract above referred to; alleged that the cutting of the wood and timber was necessary for the reparation and improvement of the premises, and was done with the assent and knowledge of Mary Van Deusen and the plaintiffs; that on the 1st day of May, 1854, the defendant was ready to fulfill the contract and receive the deed, but Mary Van Deusen and the plaintiffs refused to fulfill, and violated the agreement, whereby the defendant became entitled to \$500, the liquidated damages stipulated in the contract, for non-performance; that a considerable portion of the trees and timber were cut into rails and other materials for the improvement of the farm, and were left by him upon the premises when he was compelled to quit the same, about the 1st of May, 1854, and the plaintiffs now have possession thereof and claim to own the same; that the defendant expended on said premises large sums of money in the repairing and improvement thereof, in setting out and transplanting fruit and other trees, in erecting fences and re-

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pairing buildings, to the amount of \$1000, and increasing the value of the premises to that amount; that said expenditures were made in good faith, and that the plaintiffs have obtained the benefit thereof by preventing the fulfillment of the agreement and taking possession of the premises.

A large amount of testimony was taken upon both sides, principally on the question of damages; the plaintiffs' witnesses, in general, testifying that the acts of the defendant resulted in heavy damage to the premises, in amounts varying from \$300 to \$500, and the defendant's witnesses stating that they were not any damage, but an advantage and improvement to the premises. The number of witnesses upon this subject was nearly balanced, and the referee reported the single damages at \$150. Various objections to the plaintiffs' testimony were taken, the principal of which were aimed at the admission of testimony offered by the plaintiffs to show the difference in value of the premises in consequence of cutting down and carrying off the wood and timber in question; which objections were overruled by the referee, and the defendant excepted. A motion was afterwards made to strike out the testimony admitted under this objection and denied, and an exception taken. The defendant also moved for a nonsuit on the grounds, 1st. That the plaintiffs were not, but the defendant was, in possession at the time of the alleged trespasses. 2d. That no title was shown in the plaintiffs or in their ancestor, Mr. Van Deusen. 3d. That the defendant's acts were not wrongful but lawful, and done while in possession of the premises. 4th. That the plaintiffs were not entitled to prosecute the action jointly, and that Stephen was not a devisee. 5th. That the share of Mrs. Hendrickson did not descend to the plaintiffs, and that the action, if sustainable, should be brought also in the name of Mrs. Hendrickson, who was a necessary party plaintiff. 6th. That a joint action did not lie, but the remedy was by a several suit by each plaintiff. The referee denied the motion, and the defendant excepted. The defendant then moved to dismiss the

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complaint as to Stephen, on similar grounds, and also for want of title in him as remainderman or otherwise; also, as to Lawrence, jun. on the ground of acquiescence in the defendant's acts. These motions were severally denied, and the defendant in each case excepted. A motion was also made and refused (and exception taken) to strike out the testimony under the statutory count, for want of allegations of special or sufficient damage therein. The referee reported that Mary Van Deusen was entitled to a life estate in the premises, and the plaintiffs to the inheritance, in fee; that the parties failed to comply with the written agreement, and on the 1st of May, 1854, it was terminated, and the defendant removed from the premises and had never resumed possession; that the defendant cut and removed standing trees, the timber of which when cut amounted to 82 cords; that the damage actually done by the defendant amounted to \$150, which he trebled, and reported in favor of the plaintiffs for \$450 besides costs. No exceptions appear to have been taken to this report. The cause was submitted on printed points, by

L. Tremain, attorney general, for the plaintiffs.

John K. Porter and *Deodatus Wright*, for the defendant.

By the Court, HOGBOOM, J. The principal question to be determined in this case is, whether this action can be sustained under the provisions of the statute "Of trespass on lands." (2 R. S. 338, § 1.) The defendant claims that it cannot be: 1. Because the provisions of the act are designed only to embrace parties who have a present estate in possession in the premises, and not remaindermen. 2. Because they are designed to embrace only cases of actual trespass, and this is not of that character. 3. Because the suit is defective on account of an excess, as well as a defect of parties. 4. Because various objections to the admissibility of evidence, and to the rule of damages, were improperly overruled.

I. It is plain that the recovery was had under the statute in question. The referee reports *treble* damages, and the second count is framed nearly in the words of the statute. It is unnecessary to consider whether the fact that of the two counts in the complaint, only one is framed under the statute, is fatal to the award of treble damages, (*Mooers v. Allen*, 2 *Wend.* 247,) because no such objection was taken at the trial; and if taken, the irregularity, if any, might there have been corrected. I think, also, the allegation of damage in the second count sufficiently full, specific and special to let in all legitimate evidence of damage; at least all that was admitted at the trial, if it be otherwise free from objection. Nor do I think that the provisions of the act (2 *R. S.* 338, § 1) were intended exclusively for the benefit of persons having a present estate in possession. The words of the act are broad and comprehensive, and secure the damages to the *owner* of the land—the person whose estate or property is injured. The character of the injury therein mentioned is an injury to the *inheritance*—to the party who has the estate *in fee*. If there were any doubt upon this question, it would seem to be removed by the provisions of section 8 of title 5 of chapter 1 of part 2 of the revised statutes, (1 *R. S.* 750, § 8,) which are as follows: “A person seised of an estate in remainder or reversion, may maintain an action of waste or trespass for an injury done to the inheritance, notwithstanding any intervening estate for life or years.” The fact, therefore, of the subsisting estate for life in Mary Van Deusen presents no insuperable obstacle to the action.

II. What cases, upon the merits, or judged by the intrinsic character of their facts, are embraced within the statute? *Literally* it extends to *every person* who shall cut down or carry off any wood, trees or timber, or girdle or despoil trees on the land of any other person, without the leave of the owner thereof. The statute, however, is entitled “Of trespass on lands,” and the section in question says the offending party shall forfeit and pay treble the amount of damages

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which shall be assessed therefor in an action of *trespass*. It would seem, therefore, to be necessary that the acts complained of should be essentially acts of trespass—acts for which an action of trespass would formerly lie. They must be forcible, unlawful and unauthorized acts; they must be acts committed without license or permission of the owner. I do not think they need be acts preceded by an unlawful entry upon the lands, for the acts complained of, and for which damages are given by this statute, are not necessarily acts for which trespass *quare clausum fregit* would lie; but unlawful acts upon, and appropriations of, the property after an entry is made. This entry may be lawful or illegal, peaceable or forcible, but the lawful and peaceable character of the entry does not necessarily impart the same character to the subsequent proceedings. The question should be treated as one of substance, and not of mere form; and if the essential character of the act is wrongful, illegal and forcible, it has all the substantial elements of an act of naked trespass, and should be treated and condemned as such. It is said, however, that there is another statute—that of *waste*—which applies to cases of a possession lawfully acquired, and subsequently abused by acts of waste or injury to the inheritance, and that in this case the defendant's possession was clearly lawful, as having the written authority of the tenant for life for its support, as contained in the terms of the contract, and that therefore the action, if it lies at all, must be under the statute "Of waste," and not that "Of trespass on lands," they being in their nature entirely distinct. For the statute "Of waste," see 2 R. S. 334. It is to be observed that the remedy for waste is not restricted to cases of injury to the inheritance committed by persons having an intervening estate, as for life or for years, but applies also to a person in possession after his property is sold upon execution, and even to a trespasser against whom an action of ejectment is pending for the recovery of the property. (2 R. S. 336.) The nature of the act committed is also, or may be, widely different in the

two cases. There is many an act of trespass which would not amount to an act of waste. (*Kidd v. Dennison*, 6 Barb. 9. *Harder v. Harder*, 26 *id.* 409.) Again; the character and object of the remedies are different. In the case of waste, the judgment is that the plaintiff recover the *place wasted*, as well as treble damages. (2 *R. S.* 335, § 5.) It does not necessarily follow, therefore, that in all cases of injury to the inheritance the action must be *waste*, where the defendant is a tenant for life or years; nor that it must be *trespass* where he is not. I am not able to see why there may not be cases in actions against a tenant for life or years, in which a recovery could be had under the statute "Of trespass on lands." But assuming it to be otherwise, it seems quite clear that the defendant, though in possession under the tenant for life, did not have the entire estate, and was not entitled to all the rights and privileges of the tenant for life. He had the possession, in part or altogether, and the "privilege to do what work he might deem fit or necessary to be done on the farm." This was not by any means investing him with all the rights of the tenant for life, nor did it authorize him to do all those acts of cutting wood or clearing away forests, which in some cases a tenant for life may do without committing waste. He had paid nothing upon the purchase; he was permitted to occupy the land rather as a privilege than a right; not to enter upon it as owner, but to have a temporary possession, with a view to prepare for its permanent and advantageous occupancy when he should become the rightful proprietor. And notwithstanding the cases of *Van Wyck v. Alliger*, (6 Barb. 507,) and *Rood v. N. Y. & Erie Rail Road Co.* (18 *id.* 80,) I cannot assent to the doctrine that a party in possession without a deed, and who has paid nothing upon his contract of purchase, is to be treated in all respects as a vendee or equitable owner, or so, even as to the right to cut wood or timber. It is, in my opinion, a doctrine fraught with dangerous consequences to the real owner. It may seriously impair his security, and even destroy the value of his property. And

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if, as in this case, the contract is subsequently not performed, or is abandoned, the real owner may be without remedy for flagrant acts of waste or of trespass.

When, therefore, the contract was terminated without a consummation by deed, and it does not distinctly appear and is not found by the referee, whether it was by mutual consent or mutual fault, or which party committed the fault, the parties were, I think, remitted to their original rights, and the defendant was bound to respond for the injuries committed. And if he was not responsible under the statute in question, I am not sure that he was responsible at all—a result which would be most unjust.

It is now claimed that the referee has failed to find the facts which are essential to uphold the award of treble damages, to wit, that the trespass was not casual or involuntary; or was committed under the mistaken supposition, for which there was probable cause, that the defendant was the owner of the land. (2 R. S. 338, § 2. *Newcomb v. Butterfield*, 8 John. 342.) But these are exceptions which it belonged to the defendant to establish, rather than to the plaintiff to negate, and perhaps the referee has substantially negatived them by reporting affirmatively the circumstances under which the act was done. Besides, it is apparent from the evidence in the case that the defendant did not place himself within either of those exceptions, and we are able to see, therefore, that if the referee was right in awarding damages at all, it was a case for treble damages. If there was doubt on this question, the defendant should have procured a report from the referee upon that point. As to the conclusion of the referee that the plaintiffs had sustained single damages to the amount of \$150, there is plainly evidence to warrant his finding for even a larger amount; and although there is much evidence to the contrary also, yet it is clearly a case of conflicting and nearly balanced evidence, and the finding on the question of fact is practically conclusive.

III. The defendant also raises a question of parties. As

to the non-joinder of the widow, it is disposed of by the failure to present it by demurrer or answer. As to Stephen being an improper party, we think he was not, being in fact owner of the premises, and the fact is so found by the referee. As to Lawrence, jr., being an improper party, we think there is no such acquiescence or estoppel as forbids his uniting in the action. As to the suit being properly several, and not joint, we think the objection untenable. They are all owners, and jointly interested. The injury is to their common property, and the damage is common to all. They derive title from a common ancestor, and all together represent the estate which he had in his lifetime, and for an injury to which they may be regarded as his proper representatives. This is one of those cases where tenants in common may and ought to join. (6 *Bacon's Abr. title Joint Tenants and Tenants in Common, K. Low v. Mumford*, 14 *John.* 426. *Decker v. Livingston*, 15 *id.* 479.)

IV. It only remains to consider the objections to testimony. They are all substantially similar, to wit, that evidence of the comparative value of the premises with or without the wood and timber was improper: 1st. As furnishing no appropriate criterion of damage; and 2d, as founded on merely speculative opinion of the witnesses. But I think it was the proper test of an injury to the inheritance. (*Harder v. Harder*, 26 *Barb.* 409.) It was the test set up in the complaint, and established the amount of injury which the plaintiffs had sustained, better and with a nearer approach to accuracy, I think, than any other standard that could be adopted. At least it was not an improper mode of estimating the damages. Surely the damage would not be in all cases accurately measured by the market value of the wood or timber when cut. The trees might be a highly valuable appendage to the farm, for purposes of shade or ornament; there might be a very scanty supply for a farm of that size; or for other reasons they might have a special value as connected with the farm, altogether independent of, and superior to, their intrinsic value

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for purposes of building or of fuel. As well might you remove the columns which supported the roof or some part of the superstructure of a splendid mansion, and limit the owner in damages to the value of these columns as timber or cord wood, as to adopt the parallel rule in this case.

In arriving at a conclusion on this question of value, opinions of witnesses must necessarily be resorted to. Questions of value are always more or less questions of opinion. They are always resorted to in actions for breach of warranty of soundness to test the value between a sound and unsound animal; and so far as I know, the rule is universal, and without exception in all cases touching the value of any species of property, after a proper foundation is first laid by showing the acquaintance of the witness with this species of property. (*Lamoure v. Caryl*, 4 *Denio*, 370. *Joy v. Hopkins*, 5 *Denio*, 84.)

This was done, so far as I have observed, in every instance in the case before us. It was not indispensable that the witness should be a farmer. If he was a laborer, or a merchant, or a cooper, I suppose he was a competent witness to speak on this question, if acquainted with this property and with the value of lands in the neighborhood. There is no special science about the matter, which should limit the inquiry to eminent experts. In a single instance the question put *assumed* that the cutting and removal of the wood would diminish the value of the farm, and the inquiry was how much less it would be worth on that account. In strictness, the question was slightly objectionable; but it obviously did not mislead the witness, and resulted in no practical injury to the defendant, it being apparent from the residue of the examination of the witness, that in his estimation the diminution in value was serious and substantial. I do not think the judgment should be reversed for so slight an error, if it be one; the whole case demonstrating that it could have resulted in no detriment to the defendant. In one case also, it was assumed, as a part of the question, that the wood or timber

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cut had been or would be taken by the defendant, and the defendant renewed the objection. In this I think there was an error. There had been evidence that some of the wood had been removed by the defendant; but independent of that, the plaintiff had a right to take the witness' estimate of value or damage upon that assumption; and if, in point of fact, contrary to the legal presumption, the wood cut by the defendant was not removed by him, the defendant could show that in diminution of the damages. And no injury could happen to the defendant; for if the plaintiff's recovery was based on the assumption that the wood was taken by the defendant, the effect of the recovery would be to vest title thereto in him.

Various cases are cited on the defendant's points to show that it is incompetent to ask the witness the direct question how much *damage* has been inflicted upon or sustained by the aggrieved party; or how much has accrued to him from a particular source. But this is a very different inquiry from those propounded to the witnesses in the case in hand; and in several instances, in the adjudicated cases, the objectionable character of the question is founded upon the tenacity of the examining counsel in persisting in a peculiar mode of putting the interrogatory. (*See Giles v. O'Toole*, 4 Barb. 261; *Fish v. Dodge*, 4 Denio, 312; *Merritt v. Seaman*, 2 Selden, 168; *Morehouse v. Mathews*, 2 Comst. 514; *Norman v. Wells*, 17 Wend. 137; *Harger v. Edmonds*, 4 Barb. 256.)

The following authorities will be found, I think, in substance to sustain the interrogatories to which exception was taken in this case: *De Witt v. Barley*, 5 Selden, 371. *Lincoln v. Saratoga and Schenectady R. R. Co.* 23 Wend. 425. *Clark v. Baird*, 5 Selden, 183. *Westlake v. St. Lawrence Mut. Ins. Co.* 14 Barb. 206. *Cowen & Hill's Notes*, 700. *Lamoure v. Caryl*, 4 Denio, 370.

I have thus reviewed all the material questions suggested on the written points, with as much care and skill as I have been able to command, without the benefit of an oral argu-

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ment, and my conclusion is, that substantial justice has been done, and that the judgment of the court below should be *affirmed*.

[ALBANY GENERAL TERM, September 6, 1858. *Wright, Gould and Hogeboom*, Justices.]

BERTHA BLATTMACHER vs. JOHN A. SAAL, sometimes called
JOHN SAUER.

A complaint, in an action for a breach of promise of marriage, alleged that the plaintiff being sole and unmarried, and competent to contract to marry, and the defendant representing himself to be sole and unmarried, and competent to contract to marry, the latter, in consideration of the plaintiff's promise to marry him, promised the plaintiff to marry her. It then averred that the plaintiff, confiding in such representation and promise, continued, and still was, unmarried; and that she had no knowledge or information to lead her to believe, that the promise and representations of the defendant were false or fraudulent; and it averred that the said representations were false and fraudulent, and made with the intention to deceive; that the defendant then was, and still continues to be, a married man; and that his promise to marry was fraudulent, and to the plaintiff's damage.

Held that the complaint stated sufficiently the defendant's promise to marry, and his representation that he was unmarried, and competent to marry the plaintiff; and that it was unnecessary to allege that he knew his representation to be untrue.

Held also, that the complaint set forth a good cause of action; that if the plaintiff could not recover for the deceit and damage, she might, upon the contract and promise to marry, which implied and involved a promise and agreement that the defendant was competent, legally, to marry.

APPEAL by the defendant, from a judgment of the city court of Brooklyn. The complaint alleged that on or about the 1st day of May, 1857, the plaintiff, being then sole and unmarried, and competent to contract to marry, and the defendant representing himself to be sole and unmarried, and competent to contract to marry, and also representing

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his name to be John Sauer, did, in consideration of the promise of the plaintiff to marry said defendant, then faithfully promise to marry the plaintiff; and that the plaintiff, confiding in said representations and promise, hath from that time to this remained, and still is, sole and unmarried. That the plaintiff had no knowledge, or information sufficient to form a belief, that any of said representations of the defendant were false, or that said promise of the defendant to marry the plaintiff was fraudulent, at the time of the making of said mutual promise to marry. The plaintiff further alleged that the said representations of the defendant were false, and made with the intention to deceive and injure the plaintiff; the real name of said defendant being John A. Saal, and that he then was, for many years had been, and still is, a married man; and that the promise by said defendant to marry the plaintiff was fraudulent, and to the injury and damage of the plaintiff to the amount of ten thousand dollars, for which sum the plaintiff demanded judgment against the defendant, together with the costs of the action.

To this complaint the defendant demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the city court, on argument; and no answer having been put in, judgment was ordered for the plaintiff, and her damages were assessed by a sheriff's jury at \$5000

G. Miller, for the appellant.

Gordon L. Ford, for the respondent.

By the Court, EMOTT, J. This complaint states sufficiently the promise to marry by the defendant, and his representation that he was unmarried, and competent to marry the plaintiff. It was obviously unnecessary to allege that he knew this representation to be untrue, when he is alleged to have been in

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fact married. It then avers that the plaintiff, confiding in this representation and promise, continued, and still is, unmarried, and that she had no knowledge or information to lead her to believe that the promise and representation of the defendant were false or fraudulent, and it avers a breach of the defendant's representation and promise, and damages.

This is a good cause of action, and if the plaintiff cannot recover for the deceit and damage—a question on which it is not necessary to express an opinion at present—she certainly may upon the contract and promise to marry, which implied and involved a promise and agreement, that the defendant was competent legally to marry. It is said that the performance of the agreement was impossible and illegal. But this was unknown to the plaintiff, and her agreement was not illegal. It was to marry the defendant, if he was, and believing him to be, unmarried. It cannot be possible that she may not recover the damages which she has sustained in consequence of having innocently made this engagement, and remained unmarried to perform it. The parties are not in *pari delicto*, and the defendant must restore the plaintiff to what she has lost by his deceit, and his promise to do what he could not legally perform.

What he agreed to do was not an act illegal in itself. If it had been, no action could have been maintained upon the promise. But he promised to do an act which it was unlawful for him to consummate with the plaintiff, only because he was legally disqualified from doing it; and this was unknown to the plaintiff.

There are two cases in the English courts directly in point, *Wild v. Harris*, (7 C. B. 999,) and *Millward v. Littlewood*, (1 Eng. L. & E. 408.) The reasoning of the Barons of the Exchequer in the latter case, particularly the opinion of Baron Parke, is entirely satisfactory to us.

The judgment of the city court must be affirmed; but the defendant may withdraw his demurrer, and put in an answer

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within ten days after notice of the filing of the remittitur, on payment of all the costs since the demurrer. The judgment may stand as security.

[ORANGE GENERAL TERM, September 14, 1858. *S. B. Strong, Emott and Brown, Justices.*]

 SHAVER, receiver &c., vs. J. BRAINARD and C. J. FLINT.

Where an action, in the nature of a creditor's suit, is brought by a receiver appointed in proceedings supplementary to execution, to set aside as fraudulent a conveyance of real estate, made by the judgment debtor to one of the defendants, and a subsequent conveyance from such grantee, to the other defendant, the judgment debtor is a necessary party.

Whenever it appears that a complete determination of the controversy cannot be had without the presence of other parties, the code makes it the imperative duty of the court to cause the proper parties to be brought in.

And this, although the defect of parties appears upon the face of the complaint, and the defendants fail to demur or to raise the objection in their answer.

THIS is a suit brought by the plaintiff, as receiver of William L. Flint, in the nature of a creditor's bill, to set aside a conveyance of real estate by William L. Flint to the defendant Jerusha Brainard, and also a conveyance of the same premises by the said Jerusha to the defendant Currance J. Flint. The complaint set forth a judgment against William L. Flint, in the supreme court, an execution issued thereon, and a return by the sheriff of *nulla bona*; and the plaintiff sought in this suit to set aside the said conveyances, and for a judgment of the court, directing his judgment against William L. Flint to be paid out of the lands. By the judgment rendered at the special term, the court allowed these conveyances to stand as security for \$300, and decreed that the lands be sold and that Mrs. Brainard be paid \$300, and that the balance be applied to the payment of the plaintiff's judg-

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ment. William L. Flint, the judgment debtor, was not made a party defendant; and the defendants neither demurred to the complaint on that ground, nor raised the objection in their answer. Nor did they raise the point, upon the trial, that Flint was a necessary party to the suit. Nor did the respondents raise that objection upon this appeal.

William Murray, jr., for the plaintiff.

Loomis & Rogers, for the defendants.

MASON, J. There is no doubt but William L. Flint was a necessary and an indispensable party defendant in this case. The effect of the judgment given by the court below is to set aside his conveyance to Mrs. Brainard, and declare that the deed shall stand as a mortgage to Mrs. Brainard for \$300, and that the land shall be sold as his (Flint's) land; and after paying Mrs. Brainard's \$300, that the balance of the avails shall be applied to the payment of the plaintiff's judgment against Flint. Now, this judgment has been rendered, setting aside Flint's conveyance to Mrs. B., and ordering Flint's property to be sold, and \$300 of the avails paid to Mrs. B., and the balance upon the plaintiff's judgment, without Flint being a party to the suit, or having any notice of the proceedings, or having his day in court to show cause against it. *Non constat*, had he been summoned he would have showed this judgment paid; and perhaps, at least, he would have been able to show a good reason to the court why his conveyance to Mrs. B. should not be set aside. The amendment of the 122d section of the code by the legislature, in 1851, seems to make it imperative on the court to compel the proper parties to be brought in. That section, as amended in 1851, reads as follows: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy

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cannot be had without the presence of other parties, the court must cause them to be brought in." (*Code*, § 122.) The code, as originally passed, was that "*the court may order them to be brought in.*" (*Code*, 1848, § 102.) This substitution of the word "*must*" for "*may*" is very important, and seems to leave no discretion in the court, where the issues in the cause cannot be determined without prejudice to the rights of others, or when their rights cannot be reserved or saved, as in the present case. (*Whittaker's Pr.* 81, 2d ed.)

It is no answer to this objection to say that this defect of parties appeared on the face of the complaint, and the defendants did not demur, nor did they raise any objection in their answer, for this omission to make Flint a party. These defendants may be said to have waived every objection by not making it as the code prescribes, except where there is a necessary and indispensable party wanting, and whose rights must be prejudiced by the judgment, and cannot be saved; and in every such case they cannot waive the defect of parties. (*Van Santvoord's Pl.* 134, 672, 673. 4 *Paige*, 75. 7 *Barb.* 221. 1 *Peters*, 138, 139.)

The plaintiff is not satisfied with the judgment which he obtained, and has appealed to this court, and now claims and insists that this judgment should be reversed, and the deed set aside entirely, as fraudulent. I think we should reverse the judgment entirely, without reviewing the merits of the case, for the reason that it sets aside Flint's deed, and orders property which it declares to be his to be sold to pay this judgment, without any notice to him, and without his being made a party to the suit. I think the judgment should be reversed, and leave given to the plaintiff to amend his summons and complaint within twenty days, without costs, by bringing in the said William L. Flint as defendant, and by serving him with process.

BALCOM, J. Hubbard Niles recovered a judgment in this court against William L. Flint for \$264.66, in an action

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arising on contract. An execution in due form was issued thereon to the sheriff of Delaware county, which he returned unsatisfied. Niles thereupon instituted proceedings on the judgment, supplementary to the execution, and procured the appointment of the plaintiff as receiver of the goods and chattels of said Flint. The plaintiff, as such receiver, brought this action to have two deeds set aside, as fraudulent and void as against his judgment; one of which deeds was executed by William L. Flint to the defendant Jerusha Brainard, and the other was executed by Jerusha Brainard to the defendant Currance J. Flint; and both deeds purported to convey the title in fee to four acres of land situated in the town of Sidney in the county of Delaware.

The evidence in the case was taken before a referee; and the cause was brought to a hearing thereon at a special term of this court, held in the county of Delaware, in January, 1858, when a judgment was given, declaring that the deed from Jerusha Brainard to Currance J. Flint should stand as security to the latter for the sum of \$300; but that the land described in the deeds be sold by the sheriff of Delaware county, and that he pay Currance J. Flint the said sum of \$300 out of the proceeds of the sale; and that after paying a prior lien of \$62, he apply the residue of such proceeds to the satisfaction of the judgment in favor of Niles.

The plaintiff has appealed from the judgment to the general term of this court. And he insists that the judgment should be reversed, and that the two deeds to the defendants should be declared fraudulent, and wholly inoperative as against the judgment in favor of Niles against William L. Flint.

We ought not to determine, as the case now stands, whether the judgment should be reversed, (on the ground that it is against the weight of evidence,) or whether the deed to Currance J. Flint should be permitted to stand, in the nature of a mortgage upon the land in dispute, as security to her for the sum of \$300, within the principle settled in *Boyd v. Dunlap*, (1 *John. Ch. R.* 478;) and *Dunn v. Chambers*, (4 *Barb.*

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376 ;) for the reason that the judgment must be set aside for a defect of parties defendant.

The complaint shows that William L. Flint had the actual possession of the land in dispute, at the time the action was commenced ; also, that he was the grantor in the deed of the same to the defendant Jerusha Brainard, and the husband of the defendant Currance J. Flint. These allegations in the complaint are not controverted by the answer ; and they are established by the evidence. It was also proved that William L. Flint continued to occupy the land up to the time the evidence was taken.

The omission of the defendants to object, by demurrer or answer, that William L. Flint should have been made a defendant in the action prevents them from now taking that objection. They are deemed to have waived it. (*Code*, §§ 147, 148.)

The blame rests upon the plaintiff, for not joining William L. Flint as a defendant. He was a necessary party to the action. But the point that he should have been made a party, has not been taken by the counsel for either party on the appeal ; and the case does not show that it had been made at any previous stage of the action, or that it was considered by the judge who pronounced the judgment at the special term.

The legislature has declared that “when a complete determination of the controversy cannot be had without the presence of other parties, *the court* must cause them to be brought in.” (*Code*, § 122.) The judgment already rendered in the action does not bind William L. Flint ; and we cannot give one that will bind him, or be any evidence against him, unless he is made a party to the action before we pronounce it. He could not be turned out of possession of the land by a purchaser under any judgment in this action, as it is now situated, as to parties, without bringing an action against him, and proving that the two deeds above mentioned are fraudulent and void, and that he has no right to retain possession of the land as against such a purchaser ; and in such an action the

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defendants herein would be necessary parties. The whole controversy in this action would have to be litigated over again in such an action by the purchaser, if he could obtain a standing in court by his purchase, to litigate the same. It is therefore very plain that a complete determination of the controversy concerning the land in dispute cannot be had in this action without the presence of William L. Flint as a party. And I think it is the imperative duty of the court to set aside the judgment rendered at the special term and require the plaintiff to make Flint a defendant, before taking any further steps in the action. (*See Davis v. The Mayor &c. of New York*, 2 *Duer*, 663.) He should have been brought in as a party, before the judgment was rendered at the special term; but it is not too late to require the plaintiff to make him a defendant at this stage of the action. (*See 3 Duer*, 121; *Code*, § 122.)

The judgment of the special term should be reversed, and the order of reference in the action vacated; and the plaintiff should be directed to make William L. Flint a defendant, before taking any further proceedings in the action. But I think no costs should be recovered by either party against the other, for any proceeding subsequent to the joining of the issue in the action—whichever way the cause may be decided after Flint shall have been brought in as a party.

CAMPBELL, J. concurred.

Judgment accordingly.

[TIOGA GENERAL TERM, January 4, 1859. *Mason, Balcom and Campbell, Justices.*]

**BUNDY and others, trustees of the Otego Baptist Society, vs.
BIRDSALL and others.**

Individuals claiming to be trustees *de facto* of a religious society which has never been incorporated, cannot maintain an action against persons who are in the actual possession of land and the house of worship erected thereon, under a claim that they are trustees of, and represent, an incorporated society which owns the same; for the purpose of having the plaintiffs declared to be legal trustees of the society and the successors in office of the grantees named in the original deed of the land; and to have the plaintiffs, and those who adhere to, and act with them, declared to be the true and legitimate society, and entitled to the use, enjoyment and occupation of the house of worship; and to compel the defendants to surrender the possession thereof to the plaintiffs and account for the use and occupation; and that whatever the defendants and their associates may have done towards being incorporated, may be declared null and void; on the ground that the plaintiffs truly represent the religious faith of those who took the deed of the lot from the original grantor and erected the house of worship thereon.

Trustees of religious societies cannot sue, as such, except by the corporate name or title of the society.

A deed of land, to trustees *de facto*, of an unincorporated religious society, conveys no title to the society.

MASON W. HUGHSTON and wife, by a deed bearing date the 13th day of September, 1828, granted and conveyed half an acre of land in Huntsville (now Otego) to Elisha Lathrop, Daniel Shepherd, James Bundy, Moses Bundy, William Shepherd, Michael Birdsall, Benjamin Shepherd, Peter Bundy and David Bundy, trustees of the Huntsville Baptist Society, and their successors in office. The deed declared that the grantors granted, bargained, sold, remised, aliened, released and confirmed the said land unto the grantees and to their successors in office for ever, together with all and singular the hereditaments &c., reversions, remainders &c., and all the estate, rights, title, interest &c., whatsoever of the grantors, either in law or equity, in and to the said land, with the hereditaments and appurtenances, to have and to hold the said land, hereditaments, rights, &c. to the grantees, and their successors in office, and to the sole and only proper use, benefit and behoof of the grantees and their successors in office for

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ever. The deed contained the usual covenants of warranty that are inserted in ordinary warranty deeds. At the time the deed was executed the Huntsville Baptist Society was not incorporated ; but the society erected a meeting house on the land and occupied it for divine worship. About the year 1831 the name of the town of Huntsville was changed by the legislature to Otego ; and after that the society continued to occupy the meeting house for the purpose aforesaid, taking the name of the Otego Baptist Society. In July, 1856, the defendants, and those members of the society who acted with them, attempted to incorporate the society under and in pursuance of the statute in such case made and provided ; and the defendants claimed that such society was then duly incorporated, and that they were the trustees of the society. The defendants and those of the society who acted with them and recognized them as trustees, got possession of the meeting house, and have since had divine service therein on Sundays and at other times. The plaintiffs claimed that they were entitled to the possession of the meeting house, and that they were the legal trustees of the society ; but they did not claim to have been elected by the society under the alleged incorporation of it in 1856.

This action was brought for the purpose of having the plaintiffs declared to be the legal trustees of the Otego Baptist Society, and the successors in office of the grantees named in the aforesaid deed ; and to have the plaintiffs and those who adhere to and act with them, declared to be the true and legitimate Baptist society in Otego, and entitled to the use, enjoyment and occupation of the meeting house ; and to compel the defendants to surrender the possession of the meeting house to the plaintiffs, and account for the use and occupation thereof. The plaintiffs also asked to have whatever the defendants and their associates did in 1856 towards being incorporated declared null and void. Other relief was also demanded. After the answer was served, the action was referred to a referee to hear and determine. He reported in favor of the defendants,

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and found that the plaintiffs were not the trustees of the Otego Baptist Society. Judgment was entered on such report, in favor of the defendants, for \$215.63 costs. The plaintiffs appealed from the judgment to the general term of the court. All other facts necessary to a correct understanding of the questions determined in the case are contained in the following opinion of the court.

L. L. Bundy, for the plaintiffs.

L. J. Burditt, for the defendants.

By the Court, BALCOM, J. The plaintiffs are not named as grantees in the deed of the land in dispute, that was executed by Hughston and wife in 1828; nor have the grantees named in that deed ever conveyed the land to the Huntsville or Otego Baptist Society; and the plaintiff's counsel has conceded that the plaintiffs and their associates are not legally incorporated. His position is that they are trustees of the society, notwithstanding its lack of a corporate existence, and that they have all the rights that the grantees named in the deed from Hughston and wife took under and by virtue of that conveyance; in other words, he insists that the plaintiffs can maintain the action, as trustees *de facto* of the society, though it has never been incorporated, if they truly represent the religious faith of those members of the Baptist denomination of christians who took the deed from Hughston and wife and erected the meeting house on the land therein described. This position is clearly untenable. The defendants are in the actual possession of the land and the meeting house thereon, under a claim that they represent a corporation that owns the same; and in no view of the case can it be said that the plaintiffs have any more than a moral right to the possession thereof.

If the society had been legally incorporated, and the plaintiffs were its trustees and entitled to the possession of the land

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and meeting house thereon, the action should have been brought in the corporate name of the society. (3 R. S. 2d ed. 208, § 4. *The People ex rel. Fulton v. Fulton*, 1 Kern. 94.) For the plaintiffs do not set up any claim to the land or meeting house in their individual characters, but only as representatives or trustees of the society; and trustees of religious societies cannot sue, as such, except "by their corporate name or title." (3 R. S. 2d ed. 208, § 4.)

It is unnecessary to determine whether the defendants are trustees of the Otego Baptist Society, or whether they lawfully represent it; for the reason that the plaintiffs have no legal or equitable title to the land in dispute, and no legal or equitable right to the possession or use of the meeting house thereon.

The legal title to the land is probably in the grantees named in the deed from Hughston and wife; but if the defendants and their associates were duly incorporated in 1856, as they claim to have been, and truly represent the society named in that deed, perhaps they could compel the grantees therein named to convey the land to the society, by an action to be brought in its corporate name. (See *Robertson v. Bullions*, 9 Barb. 64; 1 Kernan, 94; 3 R. S. 2d ed. 208, § 4.) But that question need not be decided. It is enough to defeat this action that the plaintiffs have no title to the land, and no legal or equitable right to the possession thereof or the meeting house thereon.

It will not be expected that I should cite authorities to establish that a deed of land to trustees *de facto* of an unincorporated religious society conveys no title to the society. It is sufficient to say that neither the decision of the supreme court, nor that of the court of appeals, in *Robertson v. Bullions*, (1 Kernan, 243,) relied upon by the plaintiffs' counsel, shows that an unincorporated religious society can acquire title to land by such a deed.

It is a settled rule of the common law that a community, not incorporated, cannot purchase and take property in succession. (See *Jackson v. Cory*, 8 John. 385; 9 *id.* 73.)

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We are not required to determine the moral rights or religious duties of the parties; touching the matters in controversy; therefore nothing more need be said in the case, except to announce the conclusion that the judgment in the action should be affirmed, with costs.

Decision accordingly.

[TIOGA GENERAL TERM, January 4, 1859. *Mason, Balcom and Campbell, Justices.*]

CARY vs. THE CLEVELAND AND TOLEDO RAIL ROAD COMPANY.

Common carriers of passengers and their baggage are liable for the latter until its safe delivery to the owner. They are bound not only to safely carry the same to its place of destination, but there to deliver it, in a reasonable time and in a reasonable manner.

And if baggage, belonging to a passenger, after reaching its place of destination, and while still in the possession of the carrier, is destroyed, by fire, without any fault of the owner, the carrier is liable for its value.

The defendant was a corporation, created by the laws of Ohio, for the transportation of freight and passengers between Toledo and Cleveland. Between the latter place and Buffalo two other rail road companies were in operation. At Buffalo and Toledo tickets were sold and baggage was checked over the whole route. B. purchased of the defendant's agent at Toledo passage tickets for Buffalo, over the three roads, and delivered her baggage to the defendant's baggage agent, who gave her a check entitling her to receive such baggage at Buffalo. In consequence of a detention by storms, the cars did not arrive at Buffalo until late at night, and other trains arriving at the same time, there was an unusual crowd of passengers, and an accumulation of baggage, at the station, and a long time was occupied in delivering the baggage. B., who was a female, traveling alone, did not claim her baggage that night, and on calling for it, the next morning, it could not be found, and was supposed to have been destroyed by a fire which consumed the car-house and a large quantity of baggage, during the night.

Held, that under the circumstances B. was not required to demand her baggage on the night of its arrival at Buffalo; that the defendant's responsibility, as a carrier, for its safe keeping continued, and that the defendant was liable for its value. BACON, J. dissented.

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Held, also, that the defendant had the power to make the contract for the transportation of B. and her baggage, from Toledo to Buffalo; and that the validity of the contract was not affected by the fact that it was to be, in part, performed beyond the territorial limits of the state of Ohio.

The question as to the binding force of the contract, under such circumstances, does not depend upon the state line, but upon corporate power. So long as the existence of the corporation, and power to contract within the limits fixed by its charter are conceded, the same force and effect must be given to its contracts as if it had been created by the laws of this state.

Contracts should be palpably *ultra vires* before they are held to be void for that reason, at the instance of the corporation, as against innocent third persons dealing with it.

Corporations should be restricted, so far as courts can, in the use of their powers, limit them, to the exercise of their legitimate functions; but the plea that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it, is not a gracious one. Per W. F. ALLEN, J.

Where corporations owning separate lines of rail road connecting with each other and forming a continuous route, enter into an arrangement between themselves, by which, at either terminus, passage tickets are sold and baggage checked over all the roads, a person purchasing at one terminus a passage ticket over all the roads, and receiving at the same time a check for his baggage over the entire route, may recover of the company of whom such ticket was purchased the value of the baggage, in case the same is lost.

THIS action was brought by the plaintiff to recover for baggage delivered to the defendant at Toledo to be carried to Buffalo and there delivered to the passenger to whom it belonged, the plaintiff's assignor. The cause was tried at the Oneida circuit, before PRATT, J. and a jury. The defendant is a corporation organized and constituted under the laws of Ohio, for the construction and operation of a rail road for the transportation of freight and passengers between Toledo and Cleveland in that state. Between Cleveland and Buffalo, two other rail road companies—the Cleveland, Painesville and Ash-tabula, and the Buffalo and State Line—were in operation. At Buffalo and Toledo tickets were sold and baggage was checked over the whole route. On the 12th of February, 1856, the plaintiff's assignor bought of the defendant's agent at Toledo passage tickets for Buffalo over their roads, and de-

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livered her baggage to the baggage agents of the defendant, who gave her a check entitling her to receive it at Buffalo. The cars did not arrive at Buffalo until late at night on the 13th of February, having been detained by storms and obstructions, and then the train in which she was a passenger arrived at the same time with two other trains that had been detained by the same obstructions, and there was an unusual crowd of passengers, and accumulation of baggage, at the station. The car in which the plaintiff's assignor was, was not run into the car-house when the baggage was delivered. The plaintiff's assignor, a female traveling alone, did not claim her baggage that night, and on calling for it next morning it could not be found. The car-house and a large quantity of baggage was destroyed by fire during the night, and the evidence justified the conclusion that the trunk, the value of which with its contents was claimed in this action, was among the baggage destroyed.

The plaintiff had a verdict and judgment at the circuit, from which judgment the defendant appealed.

C. Tracy, for the appellant.

F. Kernan, for the respondent.

WM. F. ALLEN, J. A reversal of the judgment and a new trial is asked for, upon exceptions taken on the trial at the circuit. Only one or two questions were urged upon the argument of the appeal, yet as the counsel for the appellant has, in his printed points, taken the position that upon the whole evidence the plaintiff was not entitled to recover, and that the defendant's several exceptions were well taken, it becomes necessary to examine the several points made at the trial; and it will be convenient to examine them in the order in which they were taken.

At the close of the plaintiff's case the defendant's counsel moved for a nonsuit, on several grounds:

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1. That the proof showed that the loss of the baggage occurred after it had been carried over the defendant's road.

2. That no demand on the defendant, for the baggage, had been proved.

3. That no contract on the part of the defendant to carry Miss Bedell, (the plaintiff's assignor,) or her trunk, beyond the termination of its road at Cleveland, had been proved.

4. That the proof was insufficient to sustain the cause of action alleged in the complaint.

At this stage of the trial no proof had been given of the actual loss of the trunk. It had been delivered to the defendant's servants at Toledo for carriage to Buffalo, and upon being demanded at Buffalo of the proper person, it had not been delivered to the claimant. There was, then, no evidence that the trunk had ever left Toledo, and although there was room for a surmise that it might have reached Buffalo and been destroyed in the fire and by the burning of the car house, there was no evidence of the fact upon which the court could act. The plaintiff relied upon the non-delivery of the trunk; and if the non-delivery was occasioned by a loss or destruction at a point or under circumstances which exonerated the defendant from liability, that fact had not then been proved. The demand made at Buffalo was clearly proved, and no question was raised that it was not made of the proper person. It was assumed that the person of whom the demand was made was the one who would have had the charge of the baggage on its arrival at Buffalo, with authority to deliver it to the proper owner. He was the general superintendent at the station at Buffalo, and as such, was the proper person of whom the demand should have been made. (*The Taff Vale Co. v. Giles*, 22 Eng. Law and Eq. 202.) Whether he was the agent of the defendant for the delivery of the baggage received at Toledo and checked by the defendant's servants over the intervening roads, will be considered in another connection, so far as it becomes important to do so. That there was no proof of a contract on the part of the defend-

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ant to carry the lady and her baggage beyond the termination of its road, cannot be alleged. The proof was that she applied to the defendant's clerk and servant for a passage ticket by rail road from Toledo to Buffalo, and was furnished with tickets which carried her to Buffalo over the defendant's road and the other intermediate roads; and the defendant's clerk receiving the fare for the whole distance. Some contract was made by the defendant at that time, and if, upon the evidence, the defendant desired to make a question whether it was a contract for carriage by the defendant for the whole distance, or whether, in entering into the contract, the defendant represented and contracted for and in behalf of other corporations or individuals, as to a part of the distance, he was entitled to have such question passed upon by the jury; that is, if there was a doubt as to what the contract was, it was a proper question for the jury. But there was certainly evidence to carry the cause to the jury upon the question whether or not the defendant had contracted as alleged. The remaining point, that the proofs were insufficient to sustain the action, was not probably relied upon, aside from the specific questions made. The court properly denied the motion for a nonsuit. The defendant then gave evidence to show the connection and business relations to each other of the several rail roads forming the line between Toledo and Buffalo; that each road received the established fare for carrying each passenger over its road; that at Buffalo and Toledo tickets were sold for the whole distance; at the latter place, by the defendant's servants and agents, and at the former by the servants and agents of the Buffalo and State Line Rail Road Company; that the moneys received by the respective companies were deposited daily to the credit of the company by whom they were received; and that settlements were periodically made between the several companies. It was also proved that at Cleveland the passengers and baggage were changed to and from the defendant's cars, which did not pass over the roads of the other companies, and that separate

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tickets for passage over the several roads, but printed on the same slip of paper, were issued to passengers purchasing at Buffalo and Toledo. Evidence was also given tending to show that the baggage in question was delivered by the defendant to the Cleveland, Painesville and Ashtabula Rail Road Company, at Cleveland, and that it arrived at Buffalo and was destroyed by fire the same night. The train upon which the plaintiff's assignor was a passenger was due at Buffalo about 5 o'clock in the afternoon and in time to connect with a train going east on the New York Central Rail Road, but was detained by obstructions, and did not arrive until about 10 o'clock in the evening and after the eastern train had left; and this arrived at the same time with two other trains which had also been detained by the same causes. The owner of the baggage did not claim it that evening, but went directly from her car, which could not enter the car house, to a hotel. There was an unusual crowd of passengers and accumulation of baggage. The car house, with much of the baggage, was destroyed that night, and the owner of the trunk in suit was unable to procure it when she called for it the next morning. The servants of the rail road companies were ready and offered to deliver the baggage that arrived on those trains the same evening, and did deliver all that was claimed.

At the close of the evidence the defendant's counsel again asked for a nonsuit, on the grounds:

1. That the defendant had not legal capacity or power, under or by its charter, to contract to carry a passenger or the trunk and contents beyond the limits of the state of Ohio; that the contract of the defendant to carry Miss Bedell and her trunk to Buffalo was illegal and void; and that the defendant was not estopped from repudiating the contract and insisting upon this defense; and

2. That the liability of the defendant as a common carrier ceased when the trunk arrived at Buffalo; and there was no evidence of any negligence at Buffalo whereby the trunk

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was lost ; and that the onus of proving such negligence was upon the plaintiff.

The motion was denied by the court ; and as these two propositions in connection with those urged at the close of the plaintiff's case, somewhat modified in form, constitute the basis of the several exceptions to the charge or rulings of the judge in submitting the case to the jury, they may be considered in the same connection. The court charged the jury, 1st. That the defendant was not discharged by the delivery of the trunk in question to the Cleveland, Painesville and Ashtabula Rail Road Company ; 2d. That the contract of the defendant was to deliver the trunk at Buffalo, and refused to change the converse of the first proposition.

As the question relating to the discharge of the defendant from liability by the delivery of the trunk to the Painesville road depends entirely upon the terms of the contract, and its validity, if for carriage of the passenger and her baggage east of Cleveland, the exceptions need not be farther considered in this connection, except to repeat the remark before made that the defendant did not ask to have the jury decide what the contract in fact was. Had it done so, and the court had decided it as matter of law, it might perhaps have been error. The counsel did not object that the court, by passing upon the question, invaded the province of the jury, but the exception was based rather upon the ground that the defendant had not contracted, because it could not lawfully contract for service beyond Cleveland. In *Muschamp v. The Lancaster and Preston Junction Railway Co.* (8 M. & W. 421,) in a case somewhat similar, it was treated by the court as a proper case for the jury to determine what the contract was ; whether the railway company had undertaken to carry a parcel beyond the terminus of its road, or had agreed to carry it to its terminus and there deliver it to another carrier, for transportation. The court held that they could not say that the latter was the import of the contract, as was asked by the defendant to be decided in this case. It was assumed by the defendant's counsel to be a proper

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question for the court, as there was no dispute about the evidence; and when a question is so treated the party cannot, upon appeal, insist that it should have been submitted to the jury. (*Barnes v. Perine*, 2 *Kernan*, 18.) If there was evidence upon which the jury might have found the contract as alleged by the plaintiff, rather than as claimed by the defendant, as a question of fact, the ruling and decision of the court will be sustained: in other words, there is no error for which the judgment will be reversed. That the evidence was sufficient to establish the contract in accordance with the ruling of the court, will be seen by cases which will be referred to in considering the power of the defendant to make such contract.

The court further charged, 3dly. That she (the passenger and owner of the trunk) was not bound to get her trunk in the shortest possible time, but that she must take it within a reasonable time. 4th. That it was a question, under all the circumstances, for the jury, whether she claimed it in a reasonable time. That if the trunk was delivered to Miss Bedell (the owner) at Buffalo, so as to discharge the defendant from liability as a common carrier, the question then was whether there was negligence on the part of the Buffalo and State Line road, and if there was, then the defendant was liable. He refused to charge as matter of law that, before the fire occurred, the defendant was discharged from its liabilities as a common carrier by the delivery of the trunk at Buffalo, and its deposit in the baggage room without its having been called for; but in response to a request so to charge, instructed the jury that if Miss Bedell demanded the trunk in what, under all circumstances, was a reasonable time after its arrival, the defendant was not discharged; and if she did not demand it in a reasonable time, then the company would become warehousemen. If the Buffalo and State Line road company was guilty of negligence after its liability as a common carrier ceased, and its duty as warehousemen commenced, the defendant was still liable for the trunk. There is no claim that the trunk was in truth delivered to Miss Bedell at Buffalo, and

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therefore what was said by the judge in that connection, in regard to the liability of the defendant for subsequent negligence of the Buffalo and State Line Rail Road Company in further caring for the property, was irrelevant and need not be considered here. The relative rights of passengers and rail road companies in regard to the delivery of the luggage at the end of the passage, and the liabilities of the companies in respect to it, and the time when their responsibility as carriers cease, has not been much discussed, so far as adjudged cases have come under my notice. The duties which the proprietors of rail roads owe to their passengers, in respect to their baggage, are not in all respects analogous to the duties resulting from the ordinary contract for the carriage of merchandise, or from the liabilities of a common carrier of merchandise. Still the rules which govern that class of bailments furnish, in most cases, the rules by which rights and liabilities of passengers and rail road proprietors may be determined. The court, in *Thomas v. Boston and Prov. R. R. Corporation*, (10 Metc. 472,) in which it was held that proprietors of a rail road, who transport goods over their road and deposit them in their warehouse without charge until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for the loss of the goods from the warehouse, but are liable as depositaries, only for want of ordinary care, carefully avoided expressing an opinion as to the liability of the company for the baggage of passengers. Hubbard, J., says: "Neither do we intend to discuss the rights of passengers on rail roads in regard to their persons and baggage, nor the peculiar liabilities of the proprietors in regard to both. We confine ourselves strictly to the case of merchandise deposited after it has been transported to its place of destination." If the rule is that the liability of the carrier of persons and their baggage, as a carrier of the baggage, ceases at the instant of its arrival at the terminus at which it is to be delivered, or as soon as it can be claimed by and delivered to the owner, then the charge of the judge was erroneous in the case before us.

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The fair import of the charge was that the passenger was not bound at once to demand his baggage, but that he had a reasonable time within which to make the demand, and that the liability of the road as carriers continued until such reasonable time had elapsed; and that such reasonable time was to be determined from all the circumstances of each case. That if the baggage was left beyond a reasonable time, the character of the bailment changed and the proprietors of the road were liable as warehousemen simply, to be charged only for want of ordinary care. *Norway Plains Company v. Boston and Maine Rail Road Company*, (1 Gray, 263,) was an action against the rail road company as common carriers. The principle of *Thomas v. The Boston and Providence Rail Road Company* was applied, and it was held that the proprietors of a rail road who transport goods over their road for hire and deposit them in their warehouse, without additional charge, until the owner or consignee has a reasonable time to take them away, are not liable as common carriers for the loss of the goods by fire, without any negligence or default on their part after the goods are unladen from the cars and placed in the warehouse, but are liable as warehousemen only; although the owner or consignee has no opportunity to take the goods away before the fire.

Chief Justice Shaw says that the contract is "that they will carry the goods safely to the place of destination and there discharge them on the platform, and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith; or if the consignee is not there, ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for. * * * This we consider to be one entire contract for hire, although there is no separate charge for storage, yet the freight to be paid, fixed by the company as a compensation for the whole service, is paid as well for the temporary storage as for the carriage. * * * From this view of the duty and implied contract of the carriers by rail road, we think there result two distinct liabilities: first, that of common carriers,

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and afterwards that of keepers for hire or warehouse keepers; the obligations of each of which is regulated by law." Upon the assumption that the defendant was liable as a contractor to carry Miss Bedell and her trunk to Buffalo and there to deliver to her the trunk, the argument of Chief Justice Shaw sustains the charge of the court upon the trial of this action, to the effect that on proving neglect of the Buffalo and State Line road as warehouse keepers, the defendants would be liable.

There was but one contract, one hiring and one consideration paid for the carriage and storage of the baggage; the contract for storing resulting from and being an incident to the main contract for carriage. It follows that the party liable upon the main and express contract is liable upon the incidental and implied contract, and the Buffalo and State Line road, in the storage as in the carriage of the trunk, must be deemed the agent of the defendant, performing its contract.

It would be unbecoming in me to review the decision of the very able court, and the argument of the very learned judge by whom the opinion in the case cited was delivered. But it is open to the remark that it is highly favorable to carriers of merchandise by rail road, and much more favorable than the rule which in analogous cases has been applied to carriers by water or in any other way. It would hold the consignees to a constant watch at the rail road freight depots lest their goods might arrive and be stored in the warehouse of the company before they had knowledge of their arrival, and that without insurance or the responsibility of the carriers, except in the limited capacity of warehouse keepers. In the same case it is intimated that rail road companies are not required to give notice to consignees of the arrival of their goods.

It makes two distinct contracts where the parties make but one. The duty to deliver at the terminus imposes upon the consignee the corresponding duty of receiving the goods at the same place. The freight has been earned, and if further duty or responsibility is imposed upon the bailee it should only be upon a new consideration and under a new contract, express

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or implied ; but within the decision the bailee, having performed his duty as carrier, for which he receives an agreed compensation, is subjected, at the option of the consignee, to a further liability under a different bailment. The consignee who receives his goods at the platform, on their arrival, but performs his obligation and has had the full benefit of the contract of the carrier, and yet a negligent consignee not performing his contract is entitled to exact a further service from the carrier, and this simply to the end that the liability of the bailee as carrier may cease at the earliest possible moment and by a strict construction of the contract in his behalf, or rather by a construction complicated and against the interests of the consignee. A more simple interpretation, and one to my mind more reasonable and more in accordance with the analogies of law, would be to call the contract one of carriage simply and not contemplating storage, and that the contract was to be reasonably performed by both parties ; the carrier to deliver upon reasonable request, and at reasonable hours ; the consignee to call for and receive his goods as soon as reasonably could be, in accordance with the usage of the place and the nature of the merchandise. If the property is not taken away by the consignee within a reasonable time, then the carrier may relieve himself from further liability by storing it in a suitable place, at the risk and expense of the owner or consignee. The transit in such case, and the liability of the carrier, would cease after the owner or consignee should and might have taken his property. (*See 2 Kent's Com.* 604, 605. *Pickett v. Dorman*, 4 *Verm. Rep.* 21.) Notice to the consignee, within the authority cited, is necessary to discharge the carrier without actual delivery to the consignee and by delivering at the usual place of delivery. In *Pickett v. Dorman* it was held that the carrier was liable because he did not continue his care until he had given notice to the owner, and until the latter had a reasonable time to assume the care of them. Judge Story expresses the duty of carriers in this wise : 'It is safely and securely to carry the goods to their place of

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destination and there to deliver them, in a reasonable time and in a reasonable manner. It is not sufficient to carry the goods to their place of destination and there place them on a wharf, but due notice should be given to the consignee of their arrival, and the goods be placed in a safe custody, so that he may, upon such notice, receive them in a reasonable time." (*Story on Bailment*, § 509.) The distinction appears to be this, that if the goods are put into the warehouse of the carrier, for safe keeping, until they can be delivered according to the usage of the place, they are still at the risk of the carrier; but if they are deposited to await the owner's convenience in sending for them, the bailee is only liable as a warehouseman. (*Story on Bailment*, §§ 467, 448, 541. *Hyde v. Trenton Navigation Co.*, 5 T. R. 389.) The responsibility of the carrier ceases when the delivery is either completed or waived by the owner. (*Story on Bailment*, § 542.) As to the necessity of notice to the consignee, see *Gibson v. Culver*, (17 Wend. 305.) In *Cole v. Goodwin*, (19 id. 251,) it was decided that the omission of a passenger in a stage-coach to claim his baggage at the end of his journey where the stage stopped about an hour, and where there was no change of coaches, did not release the carrier from liability for the trunk, which was carried off in the coach and lost. The case was decided upon the ground that the loss was occasioned by the act of the carrier, whose duty it was to deliver the trunk at the place without demand on the part of the owner. The loss would not have occurred had the passenger claimed his trunk at the instant of its arrival, or at any time within the hour that the coach remained at the place where the passenger left it. If, from the time of the arrival of the coach, the proprietors were mere depositaries, holding the property subject to the direction of the owner, then the negligence of the owner in not calling for the trunk within a reasonable time would have been material; but the court held that the liability of the defendants was that of common carriers, and the negligence of the plaintiff in looking after his baggage did not tend to discharge them. When

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goods are safely conveyed to the place of destination, the carrier is prima facie bound to deliver the goods to the consignee personally; or in case of carriage by boats or ships, and as it would seem by railway, notice of the arrival and place of deposit, comes in place of actual delivery. In case the consignee is dead, absent, or refuses to receive or is not known and cannot after due inquiry be found, the carrier may discharge himself by placing the goods in store with some responsible third person in that business, for and on account of the owner. (*Fisk v. Newton*, 1 *Denio*, 45.)

The precise point involved in this case was decided by the court for the correction of errors in *Powell v. Myers*, (26 *Wend.* 591.) It was there decided that common carriers of passengers and their baggage were liable for the latter until its safe delivery to the owner. Although the point was not involved in the case, it was intimated in the opinion of Senator Verplanck, that although the arrival of a steamboat at its place of destination, with the baggage in safety, would not discharge the carrier until its delivery to the owner, still, unless demanded within a reasonable time, the liability of the owner of the boat, in his strict character of a common carrier, would not continue. The action was for a trunk and its contents, with which the plaintiff's son, a minor, took passage in the defendant's boat at West Point for New York, arriving at New York between 9 and 10 o'clock in the evening. Before arriving at New York, the son asked the captain of the boat if baggage would be safe on the boat over night, and was told it would, and the young man went on shore on arriving at New York, and returned next morning for his trunk, when it had been delivered to a negro, on a feigned order. The judge charged the jury that the defendants were responsible for the delivery of the baggage of travelers in their boat, unless it was lost by inevitable accident; that if the trunk had not been delivered to the passenger, and had not been so lost, the defendant remained liable even after the boat arrived at the wharf. There was a verdict for the plaintiff, and the supreme

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court affirmed the judgment of the New York common pleas, on the authority of *Hollister v. Nowlen*, (19 *Wend.* 234, and *Cole v. Goodwin*, *supra*;) and the court for the correction of errors held the affirmance right. The chancellor, after alluding to the facts, says, "The jury, therefore, were right in concluding that the baggage left on board was in the custody of the master, in his capacity of common carrier, until it was called for at the usual time in the morning after his arrival at the place of destination." Senator Verplanck says, "Another important point is presented in this case: this is, that the carrier's responsibility does not terminate by arrival at the place of destination, but continues unchanged until due delivery, unless he is otherwise before discharged of his peculiar custody as carrier." *Price v. Powell* (3 *Comst.* 322) decides that the responsibility of a carrier by water continues after the arrival at the port of destination, and until the consignee has notice of the arrival, and has had a reasonable time to receive the goods. In that case, as in this, it was submitted to the jury to say whether the party entitled to receive the goods acted within a reasonable time. (*And see Hoskins v. Hamilton Mutual Ins. Co.* 5 *Gray*, 432.) The circumstances of this case were peculiar, and it would have been unreasonable to require the lady who owned this baggage to demand it on the evening of its arrival at Buffalo, under the penalty of discharging the carrier from responsibility for its safe keeping. It is doubtful whether any female would have had physical strength to succeed, in that crowd, in obtaining possession of a parcel; and no one was called upon to undertake it at the peril of her person and the risk of her health. It was quite late in an inclement night, at the time of the arrival of the trains; and the plaintiff was unable to continue her journey east, as she had expected to do, by reason of the failure of the defendant and its associates to make their ordinary running time. Three passenger trains arrived at the same time, carrying an unusual crowd of passengers, and a corresponding accumulation of baggage, so much so that the usual places

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for storing baggage were entirely insufficient for the purpose. It took until nearly twelve o'clock at night to dispose of the baggage. The car in which Miss Bedell was a passenger was excluded from the car house, for want of room, and she very prudently went directly from the car to a hotel, retaining the defendant's check as her voucher for her baggage. This part of the case was properly disposed of at the circuit.

The only remaining question is as to the power of the defendant to assume the liability alleged, and in respect to which the court charged the jury, 5thly, that the defendant had power to make the contract, and was bound by it. That contracts entered into by corporations for purposes and objects not warranted by their charters, either under the direct grant of power, or as incidental to it, as tending to promote the general purposes for which the charter was granted, are void as *ultra vires*, must be conceded. In the language of Ch. J. Marshall, a corporation "possesses only those properties which the character of its creation confers upon it, either expressly or as incidental to its very existence." (*Dartmouth College v. Woodward*, 4 *Wheat.* 636.) It has no other powers than such as are specifically granted, or are necessary to carry such powers into effect. (*People v. Utica Ins. Co.*, 15 *John.* 358. *New York Firemen Ins. Co. v. Ely*, 2 *Cow.* 678. *Life and Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 *Wend.* 31. *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 3 *Kern.* 599.)

The defendant became incorporated under the laws of the state of Ohio, and this fact was urged upon the argument with much earnestness, as having an important bearing upon the question of power to make the contract alleged by the plaintiff. It is true that corporations only exist within the territory by the laws of which they are created; the laws creating them having no extra territorial force. But their existence is nevertheless recognized without the state under which they derive their existence, and they are permitted to contract, and to sue and be sued in other states. By the comity of nations, as administered by courts, a corporation

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created by the laws of a foreign state is permitted to contract in other states in matters not contrary to the known policy of the state, or injurious to its interests; or as it is better expressed in *Bard v. Poole*, (2 Kern. 495,) "a foreign corporation may make and enforce within this state contracts which by its charter it is competent to enter into, and which are not forbidden by the laws or contrary to the policy of the state." Judge Denio says, "It is, of course, implied that the contract must be one which the foreign corporation is permitted by its charter to make; and it must also be one which would be valid, if made at the same place by a natural person, not a resident of the state." Foreign corporations are permitted to sue and be sued in the courts of states other than that by which they are created, and within which they have a residence, so far as a corporation aggregate can be said to have a residence. Taney, Ch. J., says, "It is nothing more than the admission of the existence of an artificial person created by the law of another state, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another state." (*Bank of Augusta v. Earle*, 13 Peters, 519. *Mutual Benefit Ins. Co. v. Davis*, 2 Kern. 569. *Remsen v. Costar*, 14 Peters, 122. *Silver Lake Bank v. North*, 4 John. Ch. R. 370. *British Am. Land Co. v. Ames*, 6 Metc. 391.) These cases lay down the general principle, with modifications and qualifications, which are engrafted upon it, and which are most frequently brought into view in its application. There being nothing in the policy or the statutes of our state which would avoid a contract made by a natural person at Toledo precisely like the one alleged to have been made by the defendant, the question is, whether it is one which the defendant was permitted to make by its charter. It does not affect the principle that the contract was for the transportation of a passenger and her baggage beyond the territorial limits of the state of Ohio. If a contract to carry a person from Toledo to Painesville within the state of Ohio, a place beyond the terminus of the

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defendant's road, would be valid, then a like contract to transport to Buffalo would be valid. The question does not depend upon the state line, but upon corporate power. So long as the existence of the corporation, and power to contract within the limits fixed by the power by which it was created are conceded, the same force and effect must be given to its contracts as if it had been created by the laws of this state. Contracts should be palpably *ultra vires* before they should be held to be void for that reason, at the instance of the company, as against innocent third persons dealing with it. Corporations should be restricted, so far as courts can in the exercise of their powers limit them, to the exercise of their legitimate functions, but the plea is not a gracious one, that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it. Eminent judges have expressed regret that covenants entered into deliberately, and with fair intentions on both sides, should be resisted on the ground of *ultra vires*; "a sentiment," says Lord Campbell, after quoting it from Lord St. Leonard, "in which we should all concur." (*Mayor of Norwalk v. Norfolk Railway*, 4 E. & B. 446.) Erle, J., in the case last cited, conceding that it stood decided that a statute incorporating a company for public purposes prohibits by implication some contracts, claims that the principle by which that prohibition is to be implied, and the class of prohibited contracts is to be defined, is not laid down with the precision that removes doubt, and advances the opinion that the legality of this doctrine of an implied prohibition could be properly discussed only in a court of error. But acts of a corporation, not within the corporate power, *ultra vires*, are void, and the contracting parties are not estopped by the contract itself from alleging the invalidity when they are sought to be enforced. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.* 3 Kern. 599.) It would seem from the reasoning of Judge Comstock, in the case cited, that there could be no case in which the corporation would be estopped from setting up a

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want of power to make the contract upon which it is sought to be charged. Whether the learned judge intended to be so understood, is not material in this case, for the reason that there is no circumstance upon which an estoppel can be predicated in the case before us. No fraud was practised upon the other contracting party; and if the contract could not take effect as the contract of the defendant, for want of power to make it, it could take effect in another way consistent with law and the intention of the several rail roads interested in it. Certain contracts have been held *ultra vires*, when made by rail road corporations, but they have been for the construction of some independent work not embraced within the line of the road which they have been authorized to make, and having no necessary connection with the work for which they were incorporated. The principle of these decisions may be referred to the expression of Lord Campbell, in *Mayor of Norwich v. Norfolk Railway Co. supra*, "They (railway companies) have certain powers unconnected with locality; but they have other powers which may be denominated territorial, and these can only be exercised within the area specified by the act of parliament creating the company. They cannot lawfully extend the railway beyond the prescribed limits, or alter the line on which it is to be constructed." While, in respect to acts which within the remark of Lord Campbell, are "territorial" in their character, such as the purchase and holding of real estate, the construction of the railway, harbor, depot, and the like, they cannot be upheld, if done without the limits of the territory within which the corporation is permitted to act, for the reason that they may tend to advance the objects of the incorporation, to increase the tariff upon the railway, or increase the profits of the shareholders, (*per Lord Langdale in Coleman v. Eastern Counties Railway Co.*, 10 Beav. 1,) the rule is not the same as to acts "unconnected with locality;" and in such cases acts in furtherance of the main object and for the purpose of effectuating it, are valid, if not illegal by the law of the place where they are performed and not

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expressly prohibited by the charter. This distinction is recognized in all the cases, in fact, although not perhaps in words; and there is no discrepancy between the cases holding one class of contracts void and another valid. Those cases in which railway companies have been held to their contracts to be performed beyond the termini of their road, and outside of their territorial limits, when such are personal in their nature, and within the general scope of the powers conferred, are not cited as bearing upon or treated as overruled, by the cases avoiding contracts of a different character. The converse is equally true. The cases are not treated as coming in conflict with each other. *The Mayor of Norwich v. The Norfolk Railway Co.* (4 E. & B. 397) was not decided, except *pro forma* by the withdrawal of the opinion of the junior judge, to enable the parties to bring error. It was a border case; and if the contract was void it was for the reason urged by Lord Campbell, that it contemplated an act which the company could only perform within prescribed limits. *The East Anglian Railway Co. v. Eastern Counties Railway Co.* (11 C. B. 775) was the case of a contract of a like character; and Jervis, C. J., in delivering the opinion of the court, says, "It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act, and that their funds can only be applied for the purposes directed and provided for by the statute." So in *The Caledonia and Dumbartonshire Junction Railway Co. v. The Holmsburgh Harbor Trustees*, decided by the House of Lords in 1857, and reported in 39 *English Law and Eq. Rep.* 28, it was held that the contract being to expend money in the construction of a harbor not contemplated by the act of incorporation, was void as *ultra vires*.

The Connecticut cases of *Wood v. New York and New Haven Rail Road Company*, (22 Conn. Rep. 1,) and *Naugatuck Rail Road Company v. Waterbury Button Company*, (24 *id.* 468,) carry the principle of limitations upon the cor-

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porate power of railway companies to a greater extent. If there were no decision in our own courts, and the English courts, adverse to them, I should content myself by yielding to their authority and leaving it for the court of appeals to review them. But the cases in our own courts are of paramount authority, and they are sustained by the English cases, so far as the question before us has been considered by the English courts.

The contract which was enforced in *Muschamp v. Lancaster and Preston Junction Railway Company*, (8 M. & W. 421,) was on all fours with this, so far as it was affected by the question of power. A parcel was delivered at Lancaster to the Lancaster and Preston Railway Company, directed to a place in Derbyshire. The person who brought it to the station offered to pay the carriage, but the bookkeeper said it had better be paid on its delivery. The L. and P. Railway Co. were known to be proprietors of the line only as far as Preston, where the railway connects with the North Union line, and that further on with the road of another company, and so on into Derbyshire. The parcel was lost after it was forwarded from Preston. It was held that the L. and P. Railway Co. was liable. The judge charged the jury that when a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, it was prima facie evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although beyond the limits of his ordinary trade as a carrier. Lord Abinger, chief justice, held that what was the contract was properly submitted to the jury. *Watson v. The Ambergate, Nottingham and Boston Railway Company*, (3 Eng. L. and Eq. R. 497,) affirms in the queen's bench the doctrine of *Muschamp's case*, with this variation from it in circumstance—that in *Watson's case* the clerk of the railway company received pay for the carriage over the defendant's line, only. See also *Scottham v. The South Staffordshire Railway Company*, (18 Eng. L. and Eq. R. 553,)

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to the same effect. In *Weed v. The Saratoga and Schenectady Rail Road Company*, (19 *Wend.* 534,) although the case went off upon another point, Judge Cowen says: "The defendants having undertaken to carry from the Springs to Albany, cannot now be received to say they were in truth carriers no farther than Schenectady, the termination of their own road. As to the parties for whom they may thus undertake, they are estopped to deny that they are carriers for a distance commensurate with what they engage for." The precise point was involved and decided in *Hart v. The Rensselaer and Saratoga Rail Road Company*, (4 *Seld.* 37.) The marginal note of the case is, "Where three separate rail road companies, owning distinct portions of a continuous rail road between two termini, run their cars over the whole road, employing the same agents to sell passage tickets and receive baggage to be carried over the entire road, an action may be maintained against one of them for the loss of baggage received at one terminus to be carried over the whole road." The facts of the case required this decision to sustain the judgment of the supreme court, and two principles were directly and necessarily decided: 1. That several rail road companies may so unite in the carrying on of their business as that each shall become carriers and responsible as such over the lines of the road of the other companies, and beyond their own proper terminus; and 2dly. That a rail road company may become liable upon the contracts of its agents, and the receipt of freight and baggage at a point at the terminus of the continuous line farthest from its own line. The defendants' agent received the baggage in question at Whitehall; the defendants' road terminated at Ballston; two other companies completing the line to Whitehall. This case was decided on the same principle which governed *Bard v. Poole*, (2 *Kern.* 495,) where the question of power was the principal question considered, and *Bank of Augusta v. Earle*, (13 *Peters*, 587.) The principle is reaffirmed in *Quimby v. Vanderbilt*, (17 *N. Y. Rep.* 306,) decided by the court of appeals in June, 1858, in

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which the English cases, *Muschamp v. Lancaster and Preston Railway Co.* and *Watson v. The Ambergate &c. Railway Company*, are cited with approbation; and the defendant was in that case held liable under circumstances on all fours with this case, except that the defendant was a natural person. The course of legislation in this state plainly recognizes a union between connecting and continuous rail roads, precisely of the character of that adopted between the defendants and the road intermediate to Buffalo. Chapter 222 of the laws of 1847 was passed to facilitate and compel such arrangements where the facilities contemplated were not voluntarily granted. So far from treating such arrangements as *ultra vires* the corporations, the act regards them as directly within the chartered limits of power, and as calculated to promote the public objects of the incorporation. The act provides for an interchange of facilities in the transportation of cars, passengers, baggage and freight over connecting rail roads, and for the furnishing of baggage tickets over the connecting roads. The act is not an enabling but a regulating act. It does further the public interests, to advance which rail road companies are incorporated, to permit them while contracting for freight and passengers over their own lines, to contract for the carriage beyond their own lines, employing as their agents beyond their termini such instrumentalities as it is lawful for them to do; and if the Cleveland, Painesville and Ashtabula road agree to perform the contracts of the defendants by carrying freight and passengers for which the defendants have received their pay, the public interests do not suffer. Before the consolidation of the several rail road companies between Albany and Buffalo, it would have been intolerable had passengers been compelled to buy at the proper stations of each company on its own line a ticket for passage over its road, and to see that their baggage was properly delivered by one company to the next in succession, and rechecked, or upon seeking to recover for baggage lost in transit if checked for the whole distance, it was incumbent upon the owner to prove upon what partic-

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ular road the baggage was lost or received injury. This would have been the situation of the passengers as well as freighters, if the doctrine contended for here is to be upheld, and that of *Hart v. The Rensselaer and Saratoga Rail Road Company* repudiated. If that case truly expressed the law, then the owner of merchandise could have contracted with the Mohawk and Hudson Rail Road Company for its carriage to Buffalo, and would have had the guaranty of that company for the performance of the contract. But if the Connecticut cases are law, then the owner of merchandise, in order to make certain its conveyance to Buffalo by rail road, would have had to make new contracts at Schenectady, Utica, Syracuse, Auburn, Rochester and Attica. Each road would have performed its contract as carriers by transporting it over its road and delivering it at its station. The next road was not bound to receive it, nor was the road over which it had come bound to deliver it on board of the cars of the next road, and there could have been no running of the cars of one road over that of another company. In a case like this the companies do not seek to exercise any franchise, beyond the limits of their respective road. They employ such agencies as are allowed by law, to do the work which they have agreed to perform. (*See 1 R. S. 4th ed. 1240, § 53.*) The contract was one within the power of the defendant to make; and the judgment must be affirmed.

MULLIN, J., concurred.

BACON, J., concurred, on all the propositions except as to the liability of the defendant after the arrival of the property at Buffalo; holding that the liability ceased on the arrival of the cars at that city and the readiness or offer of the agents to deliver the baggage to passengers at that point, upon the authority of *Norway Plains Company v. Boston and Maine Rail Road*, (1 Gray, 263.)

Judgment affirmed.

[ONONDAGA GENERAL TERM, January 4, 1859. *Bacon, W. F. Allen and Mullin, Justices.*]

LYMAN MURDOCK *vs.* DAVID AIKIN, supervisor, and J. W. Rathbun and H. Avery, rail road commissioners of the town of Venice.

Where money has been collected and placed in the hands of town officers, for the purpose of paying the interest upon bonds issued by the town, pursuant to the provisions of a statute, and the statute makes it the duty of such officers to apply the money in satisfaction of such interest, a bondholder may maintain an action against such officers, to recover the interest due upon his bonds.

THIS action was brought against David Aikin, as supervisor of the town of Venice in the county of Cayuga, and Judah W. Rathbun and Hamilton Avery, as rail road commissioners of said town. The complaint alleged that said David Aikin, in the month of March, 1857, was duly elected supervisor of said town for that year, and that he immediately thereafter duly qualified as such supervisor, and has from that time acted, and now acts as such supervisor of such town; that said Judah W. Rathbun and Hamilton Avery were, and each of them was in said month of March duly elected rail road commissioners of said town, for the same year, and each of them immediately thereafter duly qualified as such rail road commissioners, and each of them has from that time acted, and now acts as such rail road commissioner of said town. The plaintiff further alleged that on the 2d day of March, 1853, said town of Venice, in pursuance of an act of the legislature of this state, entitled "An act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a rail road or rail roads from Lake Ontario to the New York and Erie or Cayuga and Susquehanna rail road," passed April, 16th, 1852, and for the purpose of aiding the construction of the Lake Ontario, Auburn and New York rail road, and in pursuance of said act and statute, and in accordance therewith, under the hands of the then supervisor and rail road commissioners of said town of Venice, made its certain bond or writing obligatory,

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(number four,) bearing date on the day last aforesaid, wherein and whereby said town of Venice promised to pay to bearer \$1000 with interest, at the rate of seven per cent, payable semi-annually on the first days of January and July in each year, on surrender of the coupons attached to said bond respectively as the interest became due thereon, at the Bank of the State of New York in the city of New York, the principal of said bond or writing obligatory to be reimbursable or payable at the same place, at the expiration of twenty years from January 1st, 1853. And that said town for a valuable consideration and for the full amount of the face of said bond paid by the plaintiff, and in pursuance of and in accordance with the said statute, and for the purposes aforesaid, sold and delivered said bond to the plaintiff, who thereby became and now is the legal owner and holder and bearer thereof. That by the terms and conditions of said bond, the sum of \$35, the interest money on said bond for six months, became due January 1st, 1857; that at the time when the said interest money became due and payable, and afterwards and on the 1st day of April, 1857, the plaintiff demanded payment of the same at the place of payment specified in said bond, and also at the same time offered to surrender the coupon expressing the amount of interest to be due on said bond, January 1, 1857, for the six months previous to that day, attached to said bond, yet the said town of Venice, and said defendants as such supervisor and rail road commissioners as aforesaid, utterly refused and still refuse to pay the same or any part thereof. There was a similar count in respect to another bond (number five) of the same date and amount and of a similar tenor. And there was an averment that \$35 became due thereon, for interest, on the 1st day of January 1857; and that payment thereof was demanded and refused.

And the plaintiff further alleged that before he demanded the interest moneys due on said bonds, and when the same became due, the defendants as such supervisor and as such rail road commissioners had received of and from Horace T.

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Cook, Esq., county treasurer of said county of Cayuga, in pursuance of said statute, and in accordance therewith, the money necessary to pay said interest, and which money was raised according to law, and said statute, for the express purpose of paying the interest moneys growing due on said bonds on the 1st day of January, 1857.

For a third and further cause of action, the complaint alleged that the defendants as such supervisor and as such rail road commissioners as aforesaid, on or about the 1st day of April, 1857, became, were and still are indebted to the plaintiff in the sum of \$70, with interest thereon from January 1st, 1857, for so much money before that time had and received by the said defendants as such supervisor and as such rail road commissioners as aforesaid, to and for the use of the plaintiff of and from Horace T. Cook, Esq., county treasurer of said county, in pursuance of and in accordance with said statute and act hereinbefore mentioned. And a demand and refusal of payment were averred. The plaintiff demanded judgment against the defendants as such supervisor and as such rail road commissioners, for said sum of \$70 with interest from January 1st, 1857, and costs.

The defendants by their answer denied the material allegations of the complaint; insisted that the act of April 16th, 1852, by virtue of which the bonds mentioned in the complaint were issued, was unconstitutional and void; that the bonds were improperly issued; and that if the board of supervisors of Cayuga county levied and collected any money for the payment of the interest thereon, the same was levied and collected illegally and wrongfully; and that the moneys received by the defendants, if any, from the treasurer of said county of Cayuga, of right belonged to the town of Venice, or the taxable inhabitants thereof, and that the plaintiff had no right, title or interest in or to the same.

The cause was tried at the circuit, before the court without a jury; a jury being waived by consent of the parties. The plaintiff proved the execution of the bonds, by the defend-

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ants, and offered them in evidence. The counsel for the defendants objected that the papers offered in evidence were not bonds as prescribed by the statute. 2d. That the officers elected in 1853, could not make and execute the bonds; that under the statute no commissioner could be elected except in those towns which had taken the initiatory steps under the statute, or had done some act under the same, prior to such election. 3d. That if they were acting as commissioners, they must act as a board, and not separately. 4th. That it was not averred or proved that any rail road company was ever organized; or that the consent of two-thirds of the resident tax payers was ever obtained or filed as required by said act, and that said papers were not bonds, within the statute. The court overruled the objections, and the bonds and coupons showing the interest due, were read in evidence. The amount of interest due before suit brought was \$75, as shown by bonds and coupons. The judge suggested that the defendants were town officers, and a part of the machinery for carrying out the law authorizing the making and paying the bonds of the town, and that there was no privity between them and the bond holders, and that in his opinion the plaintiff could not recover. To which suggestion and decision the counsel for the plaintiff excepted. The counsel for the plaintiff then offered to show and prove that no funds had been placed or were in the hands of the Bank of the State of New York, for the payment of the interest due on said bonds. The counsel for the plaintiff also offered to show and prove that the defendants as supervisor and rail road commissioners, on the 12th of March, 1857, received from Horace T. Cook, county treasurer of Cayuga county, \$2925.04, being the tax of 1855 and 1856, collected in the town of Venice to pay the interest on the bonds issued by that town under the law authorizing the same, passed April 16th, 1852, and that on the 12th of March, 1857, they executed a receipt therefor in their official capacities, as follows:

“Received from Horace T. Cook, treasurer of the county

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of Cayuga, two thousand nine hundred and twenty-five dollars and four cents for the balance of the tax of 1855 and for the amount of the tax of 1856, collected in the town of Venice to pay the interest on the bonds issued by said town of Venice, in pursuance of chapter 375 of the laws of the state of New York, passed April 16th, 1852."

Which said receipt was admitted to have been executed by the defendants, and the plaintiff's counsel offered to read the same in evidence. The counsel for the plaintiff offered to show and prove that after the receipt of the said money by the defendants, and after the interest money claimed in the complaint became due, and before suit brought, the plaintiff presented to the defendants his said two bonds and the said coupons, and demanded payment of the interest due thereon, to wit: \$75, and that they refused to pay the same or any part thereof. The defendants' counsel objected to each and every part of the said several offers, and insisted that an action for money had and received would not lie against the defendants, on the facts proved or offered to be proved. The court sustained the objection and refused to receive the said evidence offered. To which decision and ruling the counsel for the plaintiff excepted. The plaintiff then rested his case. The counsel for the defendants moved that the court nonsuit the plaintiff, and the court granted the motion. And from the judgment entered at the special term, the plaintiff appealed.

Geo. Rathbun, for the appellants. I. The court erred in excluding the evidence offered, to prove that the defendants had placed no funds in the hands of the Bank of the State of New York to pay the interest due on the bonds. The court also erred in excluding evidence of a demand on the defendants. Those facts were averred in the complaint, and denied by the answer. Each was a material issue, and the plaintiff had a right to give the evidence.

II. The decision of the court that there was no privity be-

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tween the bondholders and the defendants, and that the plaintiff could not recover, was erroneous. The defendants had received sufficient funds to pay the interest on all the bonds of the town of Venice; it had been paid by the tax payers of the town for this sole purpose. It came to the defendants' hands for this sole purpose. The people of the town, the debtors, had voluntarily paid the money. They had therefore no claim or title to the fund, and no interest in it, only so far as its proper application was concerned. The defendants had no claim to the money. They had received it for a specific purpose, to pay the bondholders the interest due them. Here is a moral obligation. Having received the money for the plaintiff and others, they are estopped from setting up against them any defense or objection to the completion of their undertaking. Their receiving the money for the plaintiff, and agreeing to pay him, whether that agreement is actual or implied, is privity. An action for money had and received, lies in any case where money is paid to one person to be paid by him to another, in the name of the person to whom the same is to be paid. (*Hamilton v. Canfield*, 2 *Hall's S. C. R.* 526. *Tenant v. Elliott*, 1 *Bos. & Pul.* 3. *Farmer v. Russel*, *Id.* 296.) This court ruled the same way in *The Mayor &c. of Auburn v. Draper*, (23 *Barb.* 425.) And the question of title of the person to whom the party is directed to pay the same, cannot be inquired into by the receiver. There is, in the act of receiving the money, an obligation assumed and imposed—moral and legal. Equity and good conscience demand its fulfillment; the law will enforce it. Privity—that is, consent, concurrence, knowledge—are assumed and inferred when the party entitled affirms the act and demands its fulfillment.

III. The court erred in nonsuiting the plaintiff, as well as in excluding the evidence offered. The proofs given and offered establish a clear case in favor of the plaintiff. That an action would lie in favor of a person in any case, against a party who receives money for him, and which he is directed or agrees to pay him, and refuses to do, is, as we think, proved

in our last point. The only remaining question, then, is this : If an officer, by virtue of his office, receive moneys for certain and specific purposes, to wit, to pay certain debts due the holders of certain obligations—which the statute requires him to do—which his oath of office obliges him to do—which honesty and good faith require, and which morality and equity require him to do—why will not an action lie in favor of the party wronged, against the wrong-doer? Because, said the court, he is a public officer. By what rule, or on what principle, can a court hold that an officer may trample on the rights of another, and withhold from him his property? Are the moral obligations of a public officer less than those of a private citizen? Are his legal liabilities and responsibilities less? The reverse is, and ought to be, true. But are the defendants to be regarded as any thing more or less than mere agents, to receive from the treasurer the funds provided, and to apply those funds as prescribed by the statute? (*Session Laws of 1852, p. 594, § 4.*) And in regard to the question of agency—whose agents does the statute make them in fact? Can they be said to be any more the agents of the town than of the creditor? But where, as in this case, if they are held the agents of the town, the plaintiff affirms their acts, and claims the fulfillment of their agency, does he not elect to make them, and in fact make them his agents? This we claim to be the rule of law.

W. T. Worden, for the respondents. I. The defendants are the agents and officers of the town of Venice, and responsible to their constituents, and not to *this* plaintiff, for the discharge of their duties. They owe no allegiance to *him*, and, consequently, he cannot call them to account for official misconduct or neglect of duty.

II. These defendants are only a part of the machinery and agents by and through which the town undertakes to discharge its obligations upon these bonds. If it has failed, through the agency of its own machinery and officers to discharge its

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obligations, the town is still liable. The obligation of the town is not discharged *by the failure* of its own agents and officers to pay; and the action, if any, should, therefore, be against the town, and not these defendants. (1 *R. S.* 1st ed. 327, § 1, title 1, art. 1. *Id.* 356, 7, title 5, §§ 1, 2, 3, 8. *Id.* 330, § 1, title 1, art. 1. *Id.* 350, 351, title 5, §§ 1, 2, 3, 8. *Seaman and others v. Whitney*, 24 *Wend.* 260.)

By the Court, JOHNSON J. The only question presented by this case is, whether the defendants are liable to an action at the suit of the plaintiff to recover the moneys in their hands, which had been collected and placed there, for the purpose of paying the interest of the debt due by the town. The plaintiff was nonsuited at the circuit, on the ground that there was no privity between him and the defendants. The money was paid to the defendants in pursuance of the requirements of the statute. And the statute made it their duty to pay the money thus in their hands, in satisfaction of the interest due upon these obligations of the town. (*Sess. Laws of 1852*, ch. 375, p. 593, § 4.) The defendants were public officers, with money in their hands, which had been collected and paid over to them for the express purpose of being applied upon these obligations, and for no other purpose. I do not see why the action does not lie in favor of the respective bondholders, against them.

An action for money had and received lies against a sheriff, for money collected by him, in favor of the person for whom the money was collected. This is well settled. (*Shepard v. Hoit*, 7 *Hill*, 198. *Armstrong v. Garrow*, 6 *Cowen*, 465.) These cases, I think, establish the principle that when it becomes the official duty of any one to pay over money in his hands to an individual, in satisfaction of a particular debt or demand, an action of assumpsit lies if he neglects to pay it over. In the case last cited, Chief Justice Savage said, "the action is recommended by its simplicity, and should be encouraged, where the defendant is in no danger of being misled."

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There is quite as much privity between the plaintiff and these defendants, as there is between a plaintiff in an execution and a sheriff. In either case the privity is of law, and not of contract. It is founded upon the right on one hand and the official duty on the other. And this, it seems, is sufficient to support assumpsit without any promise other than what the law implies. In this case the money was collected by tax to pay a debt of the town to the plaintiff, and I see no reason why the plaintiff has not just the same right to it that he would have had it been collected by the sheriff upon an execution against the town, after judgment in his favor. And certainly, the official obligation of the sheriff to pay over money collected by him on execution, is no stronger than that which the statute expressly imposes upon these defendants. It is manifest that the town had lost all control over this money, and was not able to give it any other direction. In this respect it is clearly distinguishable from the case of *Seaman v. Whitney*, (24 Wend. 260.) That was a case where the money was still the money of the debtor, in the hands of his agent, when the action was brought. It had not become the money of the creditor by any promise of the agent, or acceptance by the creditor, and the debtor might still apply the money in any other way as he should see fit. But it is different where money is collected by an execution or collector's warrant. There the debtor loses all control over it. It is in the custody of the law, and the debtor cannot interpose, in any respect, to direct or control its application.

The judgment must therefore be reversed and a new trial granted, with costs to abide the event.

[MONROE GENERAL TERM, September 6, 1858. Welles, Smith and Johnson, Justices.]

GARDNER vs. SMITH.

A receiver may maintain an action against the judgment debtor, of whose property he is appointed receiver, for a conversion thereof, where the debtor has converted the same after it became vested in the receiver.

But for a refusal to surrender a mere possession, to which neither the debtor nor the receiver has any legal right, and which the debtor holds only by sufferance, no action will lie by the receiver.

Where a judgment debtor, at the time of the appointment of a receiver of his property, is in possession of personal property upon which he has given a mortgage to the former owner, to secure the purchase money, which mortgage is then in force, but the receiver neglects to pay it off when it becomes due, and suffers the right of the mortgagee to become absolute, he cannot, after a demand of the possession of the debtor, and refusal, maintain an action against the latter, for a conversion of the property.

Where, in an action of that nature, the defendant alleges, in his answer, that he was not, at the time of the alleged conversion, the owner of the property, the mortgage so given by him, upon the property, is admissible in evidence, in support of that defense; notwithstanding the objection that a true copy thereof was not filed, with a statement exhibiting the interest of the mortgagee, in the property, according to the statute, and that it is consequently void as against the creditors of the mortgagor.

APPEAL from a judgment entered upon a verdict. The action was brought by the plaintiff as receiver, to recover for an alleged conversion of a *house*, and was tried at the Steuben circuit in November, 1856. By the evidence it appeared, that on the 19th June, 1851, F. W. Morrow recovered a judgment against the defendant before a justice of the peace, for \$93.28, and that it was docketed in the clerk's office June 25th, 1851. That on the 19th May, 1852, upon affidavit, an order for the examination of the defendant was made. That upon the proceedings thus instituted the plaintiff was appointed receiver, by order made August 4th, 1852. A bond was made by him as receiver, and filed 13th August, 1852. That Asen Eddy erected the building in question upon land claimed by one Goodsell, with the consent of the latter, and sold the building to the defendant in 1851 or 1852. That in June, 1854, the plaintiff called upon the defendant and demanded the house, who "said he had concluded not to let

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him have it." The plaintiff proved the value of the house, and rested. The defendant moved for a nonsuit, which was denied. He then offered in evidence a chattel mortgage given by him to Asem Eddy upon the building, to secure the purchase money therefor. This mortgage was as follows:

"This indenture made between Clark L. Smith of Hornby, in the county of Steuben, of the first part, and Asem Eddy of the town of Hornby in the county of Steuben, of the second part, witnesseth: that whereas the said party of the first part is indebted to the said party of the second part in the sum of fifty dollars. Now therefore, for the purpose of securing said debt of fifty dollars and interest to the party of the second part, the said party of the first part does hereby sell, transfer and assign to the said party of the second part, all the property described in the following schedule, to wit: a building now used by said party of the first part for a shoe shop, said building is situated upon a piece of land near the bridge across Dry run at Hornby Forks, said building is upon the west side of the highway. Provided, that if the said party of the first part shall pay to the said party of the second part the sum of fifty dollars with interest as follows: fifty dollars to be paid the first day of January, 1853, then this transfer to be void and of no effect whatever, but in case of non-payment as above mentioned, the said party of the second part shall have full power to take possession of said property, to sell the same, and apply the avails in payment of the above debt; and in case the said party of the second part shall at any time feel unsafe it shall be lawful for the same to take possession of the property, and to sell the same at public or private sale, previous to the time above mentioned for the payment of said debt, applying the proceeds as aforesaid, after deducting all expenses of sale, and of the keeping of said property."

This mortgage was dated April 13, 1852, and was filed in the town clerk's office, on the same day. It was excluded by the court, on the ground that the omission to refile a copy of the mortgage within a year rendered it invalid as against the

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plaintiff. The plaintiff recovered the value of the property, and interest.

Geo. B. Bradley, for the appellant. (Points not noticed by the court, omitted.) I. The motion for nonsuit was well made, and ought to have been granted. (1.) The plaintiff, as receiver, had no right or authority at common law to sue, and has no such right or authority now, except in the cases provided by chapter 112 of the Laws of 1845, and the rules of this court. (2 *R. S.* 4th ed. 238, § 11. *Voorhies' Code*, 2d ed. 86. *Seymour v. Wilson*, 16 *Barb.* 294. *Hayner v. Fowler*, *Id.* 300. *McKillip v. McKillip*, 8 *id.* 552, 555. *Mann v. Pentz*, 3 *Comst.* 415, 422. *Wilson v. Wilson*, 1 *Barb. Ch.* 592, 594.) This action not falling within the cases prescribed by such statute and rules, is brought without authority and cannot be sustained. (*Sess. Laws of 1845*, ch. 112. *Sup. Court Rule*, 76.) The case of *Porter v. Williams*, (5 *Selden*, 142,) is not applicable. That was not an action against the judgment debtor, nor upon a claim accruing subsequent to the appointment of the receiver, but was a case in which the right of action was given by section 299 of the code. Nor is the case of *Wilson v. Allen*, (6 *Barb.* 542,) as decided, in point here. That was not a case against the judgment debtor of whose property the plaintiff was appointed receiver. It is insisted, however, that that case did not come within the cases provided for by the act of 1845, and that the decision is no authority upon that question, because the point was not there made. The case of *Gillet v. Fairchild*, (4 *Denio*, 80,) has no application. The right of action in that case was speedily given by part 3, chapter 7, title 4, article 3, § 75, and part 3, chapter 5, title 1, article 8, § 7, *R. S.* The cause of action therein accrued before appointment of receiver, and thereby passed to him and was against a third person. The act of 1845 provides that a "receiver may sue in his own name for any debt, claim or demand transferred to him or to the possession and control, of which he is entitled as such receiver." This action is not

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brought for a debt, claim or demand *transferred* to the receiver by his appointment, nor is it brought for a debt, claim or demand, to the possession and control of which he as such receiver was entitled. The receiver, by virtue of his appointment, being entitled to the possession and control of the property of the judgment debtor, thereby got no right of action, but had the remedy which the law afforded him, to wit: he might compel him to deliver by order of the court or punish for contempt on his refusal. (*Code*, § 294, &c. *Noe v. Gibson*, 7 *Paige*, 513. *Parker v. Browning*, 8 *id.* 388. *Albany City Bank v. Schermerhorn*, 9 *id.* 372.) The receiver is a mere instrument, or officer of the court, having no authority except that conferred upon him by the court and the statute. And a disobedience of the judgment debtor to the proper demands of the receiver is a contempt of the court, but no right of action thereby accrues to the receiver. If the court had the power to confer authority on the receiver to bring an action like the one in question, it did not exercise it in this case. (2.) It did not appear upon the trial that an execution had been issued upon the judgment in question, and returned unsatisfied in whole, or in part, and for that reason the plaintiff should have been nonsuited. It was as necessary to show this fact as that a judgment had been rendered. The affidavit upon which the order for examination of the judgment debtor was made, was no proof upon the trial, of the fact of the issuing and returning the execution; a necessary fact to confer jurisdiction to make the appointment of the receiver. The code does not provide for appointment of receivers upon such affidavit, &c. (§ 298.) The fact that a judgment exists, and that an execution thereon has been issued and returned unsatisfied in whole or in part, must be made to appear like any other facts upon the trial, to show jurisdiction and authority to make appointment. The statute does not provide that affidavits shall give jurisdiction. (*Code*, § 392.) The court expressly held that the indorsement upon certificate of issuing execution was no proof thereof. It does not appear by the

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affidavit that execution was issued upon the judgment, after it was docketed in the county clerk's office. (3.) The house in question was not personal property so as to render it the subject of an action of trover, and for that reason the plaintiff should have been nonsuited. The agreement between Eddy and Goodsell, who claimed possession of the land, conferred but a personal right or license on Eddy to remove the same, which was extinguished by the sale to defendant. The defendant was the only person in possession of the land at time of demand and of commencement of this action, in whom title thereto would be presumed to be. The title to land and to the building being in same person, the latter would be merged in former. The agreement giving Eddy the right of removal of the house did not render it personal property in the absolute sense, but was part of the realty, with a right or license to remove or sever it. And until the right should be exercised, it continued to savor of the realty, so that it could not be the subject of an action of trover. (*Ferard's Law of Fixtures*, 2d ed. 77, 79, 87, 88, 173, 232, 233, [marg. p. 103, 106, 117, 215, 297, 277.] *Elwes v. Mawe*, 3 East, 50. *Hallin v. Runder*, 1 Cr. M. & R. 275. *Ex parte Quincy*, 1 Atk. 478. *Reynolds v. Shuler*, 5 Cowen, 323, 328.) Things attached to the freehold by the tenant could not be distrained for rent although he had the right to remove them. (*Reynolds v. Shuler*, sup.) The title of Eddy to the building was not absolute, but depended upon the condition that he removed it. A mere license is not transferable. (4.) It did not appear by the evidence that Goodsell had title to, or possession of the land on which the building was erected, without which his agreement would afford no right to remove it.

II. The court erred in excluding the chattel mortgage offered in evidence by the defendant. (1.) The validity of the debt it was given to secure, the good faith in which it was given, and the execution thereof, were duly proved. It bore date April 13, 1852, and was duly filed that day, more than one month before the supplementary proceedings were instituted, and nearly four months before the receiver was appointed.

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The legal title to the property was by said mortgage passed to and vested in Eddy, the mortgagee. (*Mattison v. Baucus*, 1 *Comst.* 295.) (2.) This mortgage then, at the time the plaintiff was appointed receiver, was a legal and valid one, and Eddy, by virtue thereof, then had the legal title to said property as against every body. And the receiver got no property or rights by his appointment except such as the defendant had at that time. (*Caton v. Southwell*, 13 *Barb.* 335, 337. *Browning v. Bettis*, 8 *Paige*, 568. *Voorhies' Code*, 4th ed. 456, n. i.) (3.) The court excluded the evidence, on the sole ground that a copy of the mortgage not having been refiled within the year, (although the year expired long after the appointment,) it ceased to be of validity, and the rights which might by statute be available to subsequent purchasers &c., by such omission, accrued to the plaintiff. In this the learned justice erred, because; no right or title could accrue to the plaintiff, except that which vested in him at the time of his appointment, and then no greater than the defendant himself had. The mortgage being valid, as against every person, at the time the property and rights of the defendant vested in the plaintiff, it was not rendered invalid as against the plaintiff by the subsequent omission to refile. Such omission could only enure to the benefit of those who acquire their right after the expiration of the year. (*Meech v. Patchin*, 4 *Kern.* 71. *Hill v. Beebe*, 3 *id.* 556.) (4.) The evidence was competent to show title and right out of the plaintiff, and also out of the defendant, and in another by whose permission the defendant had possession. (*Schermerhorn v. Van Volkenburgh*, 11 *John.* 529. *Rotan v. Fletcher*, 15 *id.* 207. (5.) The evidence was competent at least in mitigation. (6.) The fact that the defendant omitted to state any ground of refusal at time of demand is no *estoppel*. It is only when a party states a ground of refusal, that he will not be permitted to assert another or different one. (*Everett v. Coffin*, 6 *Wend.* 603.) (7.) The title or right of the plaintiff to the property was in issue by the pleadings. And if the evidence offered would be in miti-

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gation, it would not only be unnecessary but improper to make it a subject of pleading.

Wm. Irvine, for the respondent. I. As to the power of the receiver, in the premises, see *Act of April 28, 1845, ch. 112, p. 90, § 2*; *Wilson v. Allen*, (6 Barb. 542;) *Gillet v. Fairchild*, (4 Denio, 82;) *Brouwer v. Mills*, (1 Sandf. R. 629.)

II. The mortgage was properly excluded. The receiver stood in the place of the creditor, as a representative enforcing the rights of the creditor under the direction of the court. (1.) It was not admissible under the answer. (2.) The omission to file the statement made the mortgage void as to creditors.

By the Court, JOHNSON, J. I am satisfied, upon a careful consideration of this case, that the chattel mortgage, offered by the defendant in evidence, ought to have been received. It was proved to have been given to secure the purchase money of the property in question, and taken by the mortgagee in good faith. The defendant, in one of his answers, alleged that he was not, at the time of the alleged conversion, the owner of the property.

It is to be assumed, for the purposes of this question, that the mortgage was a valid subsisting one, at the time the plaintiff received his appointment.

This being so, what interest did the plaintiff take, by virtue of his appointment? He took only the interest which the defendant then had, which was the mere equity of redemption. Eddy, the mortgagee, had the legal title, and the defendant the right to acquire it by paying off the mortgage. The mortgage, it will be seen, by its terms, gave the defendant no right to the possession of the building for any definite period of time, but the mortgagee might take possession, and sell at any time before the day of payment, when he should feel unsafe. The defendant, therefore, had no legal property in the building, conceding it to be personal property, as it

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undoubtedly was, from the evidence in the case, but a mere equitable right. This right was not the subject of sale upon execution; (*Mattison v. Baucus*, 1 Comst. 295;) and if an action could be maintained for the conversion of such an interest as the defendant had in the property, what measure of damages could the plaintiff recover? The demand by the plaintiff, and the refusal by the defendant, upon which this action was brought, was about the first of June, 1854, nearly a year and a half after the title of Eddy, under the mortgage, had become absolute, at all events as against the defendant, and of necessity against all others standing in his shoes, also. The plaintiff, it seems to me, beyond all doubt stood exactly in the defendant's shoes, in respect to this mortgage. He took all the interest the defendant had in the property, and no more, the day he filed his bond, as receiver, which related back to the day of his appointment, on the 4th of August, 1852, which was before forfeiture, and while the mortgage was good against all the world. At any time before the first of January, 1853, before the mortgage debt became due, he might have paid it off, and vested the whole legal title in himself. But he had neglected to do so, and consequently the right of the mortgagee had become absolute, as against the plaintiff, long before he made a demand of the defendant. Neither the defendant nor the plaintiff had any interest in the property which could be the subject, legally speaking, of a conversion, when the demand and refusal occurred.

The mortgage was excluded as evidence, on the ground that a true copy was not filed, with a statement exhibiting the interest of the mortgagee in the property, according to the statute, and that it was consequently void as against the creditors of the mortgagor. But the plaintiff was not a creditor, nor did he represent one, within the contemplation of the statute, as respects this mortgage, at the time the demand was made of the defendant. He occupied the position of the mortgagor; and the mortgagee was no more bound to keep a copy and statement filed as against him, than he was against

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the mortgagor himself. The interest of the mortgagor had, by virtue of the appointment of the receiver, been applied to the benefit of the creditors, or transferred to the receiver for the creditors' benefit, so that the defendant had been entirely divested of it; and if it was of any value the creditors lost the benefit of it, through the neglect and default of the receiver.

The creditor had no farther right or claim upon that property. His remedy in respect to it had been exhausted, and he was no longer a creditor of the defendant as regards that property. The statute makes the mortgage void where a copy and statement is not filed as therein prescribed, as against such creditors only as have not enforced their remedy against the mortgagor's interest in the mortgaged property. After the rights of the creditor, in pursuing his remedy, had become fixed and certain as between him and the mortgagee, they could not be enlarged by any subsequent neglect of such mortgagee, although they might become forfeited by his own neglect to redeem. (*Hill v. Beebe*, 3 *Kern.* 556. *Meck v. Patchin*, 4 *id.* 71.) But suppose the action can be maintained, all the plaintiff can recover is, the value of the interest he had in the property at the time of the alleged conversion, which was, if any thing, but the value of the right of redemption. The defendant had set up in his answer that he was not the owner of the property, and I do not see why, in any view of the case, he was not entitled to the evidence in mitigation of damages. But, I confess, there seems to me much graver difficulties in the case than this.

The defendant has not interfered with the plaintiff's right of redemption in any respect, so far as the evidence shows. He has not converted or destroyed that right, even if it were a subject of conversion for which an action at law would lie. All he has done is to refuse to surrender a mere possession, to which neither he nor the plaintiff had any legal right, and which he held only by sufferance.

I entertain no doubt of the right of a receiver to maintain an action against the judgment debtor where he has really

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converted the property after it has become vested in such receiver, either by sale or destruction, so that no delivery can be made. It is well settled that he may maintain it against a stranger, and I see no reason why he may not against the debtor himself. (*Wilson v. Allen*, 6 Barb. 542. *Gillet v. Fairchild*, 4 Denio, 82. *Brouwer v. Hill*, 1 Sand. 627. *Porter v. Williams*, 5 Seld. 142.)

I think the ruling at the circuit was right upon all the points raised, except the exclusion of the mortgage.

The judgment must be reversed, and a new trial ordered, with costs to abide the event.

[MONROE GENERAL TERM, September 6, 1858. Welles, Smith and Johnson, Justices.]

THE PEOPLE, *ex rel.* John Keenholts, executor, &c. *vs.* A.
D. ROBINSON, Albany county judge, and others.

Where, after the issuing of a common law certiorari to remove into the supreme court for review, proceedings had before referees appointed by a county judge to hear and determine an appeal from the order of commissioners of highways laying out a private road, the relator dies, leaving a will by which she appoints an executor, and authorizes him to control and manage the real estate devised, during the minority of the devisees, and "to receive the rents, issues and profits thereof," and apply them for certain specified purposes, the executor is the trustee of a valid active trust, and as such has the legal title and an actual estate in such real estate; and is the proper person to continue the proceedings upon the certiorari, as relator, in the place of his testatrix.

An appeal does not lie to the county judge, from the decision of a jury summoned upon the application of commissioners of highways, determining that a *private road* applied for is necessary, and assessing the damages of a land owner.

Consequently the county judge has no power to appoint referees to hear and determine an appeal of that nature.

COMMON law certiorari, issued by the supreme court, on the application of Mary Keenholts, to A. D. Robinson,

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Albany county judge, Titus Rushmore, James B. Wands and John I. Groesbeck, referees, to remove into this court for review the proceedings had before the referees, who were appointed by the said county judge to hear and determine the appeal of Jew I. Jewett from the order of the commissioners of highways of the town of Guilderland, in that county, laying out a private road. From the return of the judge and referees to the writ, it appeared that Mary Keenholts, on the 16th day of December, 1854, made application to the commissioners of highways of the town of Guilderland for the laying out of a private road across the lands of Jew I. Jewett, pursuant to chapter 174, laws of 1853; and that thereupon the commissioners proceeded, as required by that statute, to obtain a jury to determine as to the necessity of the private road applied for, and to assess the damages of Jewett. On the 8th day of January, 1855, a jury, selected, summoned and sworn as required by that act, viewed the premises, heard the allegations of the parties, and such witnesses as they produced, and determined that the private road, as applied for, was necessary, and they assessed the damages of Jewett at the sum of \$180. On the 11th day of January, 1855, the commissioners laid out and made a record of the road as applied for. On the 23d day of the same month Jewett appealed from the order of the commissioners to said county judge; who, on the 23d day of March, 1855, appointed three of the defendants referees, to hear and determine the appeal, and on the 24th day of April, 1855, the referees reversed the order of the commissioners. Mary Keenholts, by her counsel, appeared before the referees at the time of their meeting, and objected to their jurisdiction to hear and determine the appeal, which objection the referees overruled. After the return to the writ was filed in this court, Mary Keenholts died, leaving a will appointing John Keenholts sole executor, and authorizing him to control and manage the real estate devised, during the minority of the devisees, who were respectively of the ages of eleven and thirteen years, and "to receive the rents, issues and profits"

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thereof, and apply them for certain specified purposes. On the petition of John Keenholts, he was substituted as relator, at a special term of this court. When the cause was moved for argument, by the relator, the counsel for Jewett moved to dismiss the writ and all the proceedings, on the ground that the writ had abated by the death of Mary Keenholts, and that the proceedings could not be continued in the name of the executor. The motion to dismiss, and the argument upon the merits, were heard at the same time.

Ira Shafer, for the relator.

J. H. Clute and *Lyman Tremain*, for the defendants and Jew I. Jewett.

By the Court, GOULD, J. There is no dispute about the facts in this case, and they sufficiently appear by the return to the certiorari, upon which the case comes before us. But the points really taken on the argument are, 1st, has this executor any right to continue the proceedings commenced by his testatrix? By her will the executor was authorized to control and manage the real estate, during the minority of the devisees; to "receive the rents, issues and profits" thereof, and to expend them for certain specified uses. He is thus, though *called executor*, the trustee of a valid active trust, and as such has the legal title and an actual estate in this real estate. (2 Comst. 19, 298.) It seems to me that such a trustee has, and is the only person who has, the right to go on with this proceeding. Naming him as executor (in the proceeding) does not show that he *proceeds as executor*, but, in connection with the will, shows that he is the trustee pointed out by the will; he is trustee, by being executor.

The other point to be decided is, had the county court jurisdiction of the matter, so that it could appoint referees? This must be answered by arriving at the true construction of the statutes relating to the laying out of private roads. There is,

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doubtless, some lack of precision in the words used in the statutes; as they speak of "highways," "roads" and "private roads," if not interchangeably, at least without careful discrimination. I think, however, that reading the statutes (1 *R. S.* 4th ed. 1040 to 1048; *L. of* 1853, 308, 9, 10,) will lead most persons to the conclusion that *highway* and *road* are used as nearly, if not quite, synonymous; while a private road is almost invariably specified as private. (*See* 9 *John.* 349.) Still I do not deem this construction absolutely essential to the decision of the case, since taking the law of 1853, (as above cited,) in connection with section 8 of chapter 455 of Laws of 1847, p. 584, (1 *R. S.* 4th ed. 1047, § 103,) I am unable to see that the county court has power to appoint referees; or that any appeal lies to the county court, save in a case where the "determination" (or decision) for or against the laying out &c. of a road, *is made* by the *commissioners of highways*. That their act is judicial—is a decision—is not merely founded on my understanding of the language of the statutes, but is sustained by Chief Justice Nelson, (25 *Wend.* 454:) "The statute contemplates the judgment of three distinct bodies of men, if desired, &c. 1. the *freeholders*; 2. the *commissioners of highways*; 3. the *judges*"—two of which bodies must concur in laying out &c. (*See also* 24 *Wend.* 495.) But, in the case of a private road, the commissioners have no power to determine or decide any thing. The act of 1853 (*L. of* 1853, p. 309, § 10) provides "if they (the jury) shall determine that the proposed road is necessary, they shall assess &c., and shall deliver their verdict, in writing, to the commissioners;" and by section 12, the commissioners shall annex to such verdict the application, &c., and hand the same to the town clerk, who shall file the same, and "the commissioners *shall* lay out and make a record of said road as described in the petition of the applicant." As section 17 (page 310) of the same act repeals other provisions, these are the statutes now regulating appeals and the laying out of private roads; and an appeal is strictly created by and to be governed by the stat-

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ute. I cannot see any right of appeal to the county court, from the verdict of the jury given as to this road, and it must be adjudged that all the proceedings in that court are void, for want of jurisdiction. They must be set aside.

[ALBANY GENERAL TERM, September 6, 1858. *William B. Wright, Gould and D. Wright, Justices.*]

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THE PEOPLE, *ex rel.* McConnell, *vs.* BAKER, Treasurer of
Monroe county.

After money has been properly raised by a board of supervisors, for a legitimate object, they have the power to change the appropriation, and devote the money to another object equally within the scope of their powers.

The power to raise a given sum of money, for several specified objects, necessarily includes the power to designate the number to which it shall be applied, and the amount which shall be devoted to each object.

After a board of supervisors have raised a fund for the purpose of building a fire-proof clerk's and surrogate's office, they may rescind the resolution providing for the erection of such office, and appropriate the money, or a portion of it, to the erection of an addition to the county penitentiary.

MOTION for a mandamus to compel the defendant to pay a draft of \$1059.39, drawn by the superintendent of the Monroe county penitentiary, to pay for labor performed and materials provided in building an addition to such penitentiary. The labor was performed under a contract made with the board of supervisors of Monroe county, by the relator, for building an addition to the Monroe county penitentiary. It appeared from the papers, upon the hearing, that the board of supervisors of the county, at their annual meeting in 1857, resolved to build a fire-proof county clerk's and surrogate's office, and for that purpose, by the issue and sale of the bonds of the county, raised a fund of \$23,500, and appointed a committee with suitable powers to contract for and superintend the construction of such building. The fund was in the hands

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of the county treasurer. In 1858 the board of supervisors resolved to construct an addition to the penitentiary, and for that purpose determined to discharge the committee appointed the previous year, and to appropriate \$12,000 of this fund to the erection and completion of such addition. The treasurer refused to pay the draft. The payment was refused mainly on two grounds: 1st. That the penitentiary was not a county building; and 2d. That the money having been raised for another object was already appropriated, and the board had no power to change the appropriation and devote the fund to other purposes.

H. R. Selden, for the relator.

S. Mathews, for the defendant.

By the Court, JOHNSON, J. The defendant was right in refusing payment of the draft in question, if the board of supervisors had no power to appropriate the fund, on which it is conceded to have been drawn, to the purpose of building an addition to the penitentiary. It is a question of power in the board of supervisors of the county of Monroe. The fund, amounting to \$23,500 was raised in pursuance of a resolution of the board of supervisors, at their annual meeting in 1857, by the issue and sale of bonds, and paid into the treasury, for the purpose of building a fire-proof county clerk's and surrogate's office for said county of Monroe.

By the present constitution, the legislature are authorized to confer upon the boards of supervisors of the several counties of the state such further powers of local legislation and administration as they shall from time to time prescribe. (*Art. 3, § 17.*) In pursuance of this provision, the legislature in 1849 enlarged very considerably the powers of these bodies, both legislative and administrative. (*Sess. Laws of 1849, ch. 194.*) By section 4, subdivision 6 of this act, these boards were authorized to cause to be erected *necessary* buildings for

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poor houses, jails, clerk's and surrogate's offices, or other county buildings, and prescribe the manner of erecting the same. By sub. 7 of this section, they have power to cause to be raised by tax upon such county any sum of money to erect "any of the buildings mentioned in this act," not exceeding the sum of \$5000 in any one year. By sub. 8, they are empowered to borrow money for the use of such county, to be expended in the purchase of any real estate, or for the erection of any such buildings, and to provide for the payment thereof, with interest, by tax upon such county, within ten years from the date of each loan, in yearly installments or otherwise. It is entirely clear, I think, that the penitentiary is a county building of the county of Monroe. It was built by the county, is owned by the county, and is under the exclusive supervision, management and control of county officers. It is no more nor less than a jail for the imprisonment of persons convicted of crime, who may be compelled to work, under the rules and regulations prescribed by the board of supervisors. The fact that persons in certain other counties may be sentenced to imprisonment in this building does not, in any respect, affect its character as a county building, because persons from such other counties can only be received in this building as prisoners in pursuance of an agreement entered into between the boards of supervisors of such other counties respectively and the board of supervisors of Monroe county. It is also clear, I think, that the erection of an addition to such building falls directly within the power to "cause to be erected necessary buildings" of this description. This power includes the right to make *necessary* additions and repairs, as well as to erect in the first instance. And whether this addition was necessary or not, the board of supervisors were exclusive judges.

If I am right in the position that this is a county building, it follows unavoidably that the board of supervisors might have borrowed the amount necessary to erect and complete the addition, and provide for its payment by a tax upon the

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county, if such amount should not exceed the limit of the debt creating power prescribed to them by statute.

The only remaining question then is, whether the board of supervisors had the power to appropriate this fund, raised for the purpose of erecting a fire-proof clerk's and surrogate's office, to the erection of this addition to the penitentiary. I agree that boards of supervisors are bodies having no powers except such as are conferred by the legislature, and that they can exercise no other power than that prescribed by law, except such incidental powers as are necessary to the full and complete exercise of the power expressly conferred. And this is the rule prescribed by statute. (1 R. S. 364, § 2.) But in giving construction to such powers, it is always necessary to consider the nature of the power given to be exercised. The power to cause a tax to be levied, and to determine the object to which the money, when collected, shall be applied, is in its nature and character legislative power. This power, when exercised by a board of supervisors, is declared by resolution instead of enactment; but the resolutions of such bodies, when acting within the scope of their authority, have all the validity and force, as law, which pertain to enactments of the legislature. It is conceded by the defendant's counsel that this money was properly raised by the board for a legitimate object, but he denies that they have power to change the appropriation and devote the money to another object equally within the scope of their powers, and the accomplishment of which, in their judgment, the interests of the county, committed to their charge, more urgently demands. But I am of opinion that the power to raise a given sum of money for several specified objects, necessarily includes the power to designate the number to which it shall be applied, and the amount which shall be devoted to each object. The power to enact a law, by necessary implication, carries with it the power to refuse to enact and to amend, modify and repeal enactments when made, unless some special limitation is annexed to the power granted. No question of vested rights

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intervenes here, and I can see nothing to prevent the board of supervisors reconsidering the resolution to build a clerk's and surrogate's office, and rescinding it, if, in their judgment, the public interests require it. Indeed it was scarcely denied by the defendant's counsel, upon the argument, that the board had power to determine not to erect the clerk's and surrogate's office, notwithstanding the money had been raised and paid into the treasury for that purpose. But it was insisted that when the object to which it should be devoted had been once designated, the power of the board was spent, and a new appropriation could not be made, even if the object first designated had been rightfully abandoned. But this, it seems to me, would be construing the power conferred upon these county legislatures altogether too strictly, and to the manifest detriment of the interests of the county. The very nature of the power conferred implies a reasonable discretion in its exercise, within the limits prescribed.

When the present board discharged the committee appointed by the former board to contract for and superintend the erection of the clerk's and surrogate's office, they necessarily and designedly abandoned the erection of such building. The money which had been raised and paid into the treasury for that purpose, then remained in the treasury unappropriated. It was the money of the county, and could only be applied to some legitimate county purpose within the province and control of the board of supervisors. To hold that the board of supervisors could not, when thus situated, appropriate the fund to some purpose for which they could borrow money and burthen the county with taxation, would operate to deprive the corporate property of the county of guardian or owner. The powers of a county, as a body politic, can only be exercised by the board of supervisors thereof. And power is expressly given to them to make such orders concerning the corporate property of the county as they may deem expedient. (1 R. S. 366, § 4, *sub.* 1.) There is abundant authority to justify the board in ordering this money, remaining thus in

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the treasury unappropriated, to be applied to the erection of this addition to the penitentiary which they had the power and had determined to erect. The resolution of the board appropriates a sum not exceeding \$12,000 out of the \$23,500 in the treasury raised for the purpose of erecting the clerk's and surrogate's office, leaving \$11,500 still in the treasury to be applied to the erection of the clerk's and surrogate's office, should the board of supervisors hereafter determine to proceed with the erection thereof. But even had the board done nothing in the way of abandoning the project of erecting a clerk's and surrogate's office, there is no valid reason, that I can perceive, why they might not use a portion of the funds raised for that purpose in repairing and erecting other county buildings.

It will scarcely be pretended that the board are unalterably bound to expend all the money raised for the erection of the clerk's and surrogate's office, because it was raised for that purpose, especially if the interests of the county should only require the expenditure of a less sum in such erection. And yet the argument must go to this length to maintain the position that when an appropriation is once made the power of the board is spent, and they are without power to make any change. It is obvious that if they can modify or change at all, they may make any change they may deem beneficial to the county, within the scope of the general power. The power to divert and appropriate a part or the whole of a sum of money, raised for the purpose of erecting one county building, to the repair, improvement or erection of another county building, for which the same money might have been borrowed, and its payment provided for by tax, is clearly, in my judgment, an incident to the general power to borrow and expend the money for both objects, and to cause a tax to be levied to repay the money thus borrowed, with interest. It is certainly within the scope of the general power, and wholly, as it seems to me, within the discretion necessarily incident to any beneficial use or exercise of the power thus conferred.

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Indeed it would be a manifest abuse of power, by the board of supervisors, to resort to borrowing and taxation, to raise funds for the erection of this addition to a county building, when the county had unemployed funds in the hands of the treasurer, raised for the same general objects. I am of opinion, therefore, that the resolution appropriating the \$12,000 to the erection of this addition is a valid and binding resolution, and that all moneys paid by the treasurer in pursuance of it will be paid in pursuance of law. It follows that a mandamus must be allowed, payment having been refused by the defendant.

[MONROE GENERAL TERM, December 6, 1858. *Welles, Smith and Johnson, Justices.*]

LOTT vs. SWEZEY and PRINDLE.

Where money has been collected, or received upon a judgment valid at the time and binding between the parties, and that judgment is subsequently reversed, the money may be recovered back, although the payment may not have been coerced by actual duress.

The remedies by order of restitution, or by *scire facias*, in such a case, are merely cumulative, and do not bar an action.

THIS was an appeal from a judgment entered at a special term, in favor of the plaintiff, upon a demurrer by the defendants to the complaint. The complaint alleged that on April 15, 1856, the defendants recovered a judgment against the plaintiff, in an action in the city court of Brooklyn, for \$268.05. That on April 27, 1857, the plaintiff paid to the defendants the amount of said judgment. And that on an appeal to the general term of the supreme court, judgment was rendered on July 24, 1857, reversing the judgment of the city court, and ordering a new trial; and the plaintiff demanded judgment for the sum paid by him, with interest. The de-

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defendants demurred upon two grounds : 1. That there is another action pending for the same cause between the parties, as appears upon the face of the complaint ; and 2. That the complaint does not state facts sufficient to constitute a cause of action.

The following opinion was delivered at the special term, upon the argument of the demurrer.

BROWN, J. " The demurrer assumes the truth of all the facts alleged in the complaint and upon which the plaintiff relies to recover. It therein appears that the present defendant prosecuted the plaintiff in the action in the city court of Brooklyn, and recovered judgment against him for the sum of \$268.05, which he afterwards paid to the present defendants. He also brought an appeal from the judgment to the general term of the supreme court, where the judgment was reversed and a new trial ordered.

The right of the plaintiff to recover the money thus paid, in an action for money had and received, is quite clear, both upon principle and authority. The payment was not voluntary ; it was coercive. The judgment was the highest kind of coercion. It was a lien upon the defendant's real property which he then had or might thereafter have, and the order and direction of a competent court to pay over the money, on execution, was not wanting to give the payment a compulsory character.

The 330th section of the code gives to the appellate court, upon a reversal of a judgment, power to order restitution of all property and rights lost by the erroneous judgment. This power to redress is cumulative, and does not take away the common law rights of a successful appellant who has paid over the money upon an erroneous judgment. Besides, it may or may not be exercised by the appellate court, and unless it be exercised at the time of the reversal, it cannot be exercised after the record has been removed to the inferior court for a new trial.

The plaintiff is remediless, unless he can maintain his ac-

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tion, assuming that the action in which the money was paid is still pending in the city court of Brooklyn. I know of no process or proceeding by which the payment of this money can be brought to the notice of that court, nor do I perceive any power it has to grant redress. Its authority is limited to hearing and determining the action pending there upon the pleadings as they existed at the time the action was first tried. The payment of the money in satisfaction of the judgment by the present plaintiff, is not an offset or counter-claim. It cannot be set up as a defense, because that would be an admission of the right of the plaintiff in the action in the city court to recover against the present plaintiff, whereas the present action proceeds upon the ground that the recovery in the city court was erroneous, and that the plaintiff had no legal right to recover any thing from the defendant, the plaintiff in this action. The cases of *The Bank of the United States v. Bank of Washington*, (6 *Peters*, 8;) *Clark v. Pinney*, (6 *Cowen*, 297;) *Sturges v. Allis*, (10 *Wend.* 354;) *Chitty on Contracts*, 639, note, 5th ed., are authorities in favor of the plaintiff's right to recover.

Judgment is given for the plaintiff upon the demurrer, with leave to the defendants to answer within twenty days, on payment of costs."

From this judgment the defendants appealed to the general term.

W. B. Ackley, for the appellants. I. The ground of the right to recover in this action can only be put by the plaintiff, upon the principle by which the action of "*indebitatus assumpsit*" for money had and received, at common law, was sustained; that the defendants have money, which, "*ex æquo et bono*," or, "by ties of natural justice and equity," they ought not to retain. If the plaintiff claims that he is entitled to recover without reference to the rights of the parties in the original action, (which must here be taken to be undetermined,) it can only be because he has been obliged to pay by rea-

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son of an erroneous judgment. But this is one of the facts constituting his cause of action, and should be alleged in the complaint. If upon this complaint the payment does not appear to have been compulsory, this ground of recovery fails.

II. There is nothing in the complaint to show that the payment therein alleged was in any legal sense compulsory. (1.) No fact, circumstance or motive is alleged as the cause or inducement of the payment. (2.) The recovery of a judgment merely does not, as matter of fact, operate as any constraint upon the defendant or his property. It is not a lien upon his real estate until it is docketed in the county clerk's office. It does not bind his goods until execution is delivered to the sheriff. The judgment is not alleged to be an order and direction of the court to pay over the money, and must be taken to be an ordinary money judgment, which is entirely inoperative until some proceedings are taken by the plaintiff's subsequently to the recovery of the judgment. (3.) It is unnecessary to consider how much or how little will suffice to give a compulsory character to the payment, when nothing besides the fact of the judgment and its payment is alleged. (4.) Only what occurred at or before the time of payment, can indicate whether it was voluntary or not. In this respect the complaint is silent.

III. The authorities are numerous, to the effect that a voluntary payment, where there is no fraud or mistake, or duress of person or goods, cannot be recovered back. (*Chase v Dwinall*, 7 *Greenl.* 134. *Fleetwood v. City of New York*, 2 *Sand.* 475. *Harmony v. Bingham*, 2 *Kern.* 99. *New York and Harlem R. R. Co. v. Marsh*, *Id.* 309.) The cases cited in the opinion delivered at the special term, and also every case therein referred to, and every case of the same nature that could be found in the digests, have been examined by the appellant's counsel, and in each the payment of the judgment was shown to be enforced either by execution and sale or by other circumstances independent of the mere recovery of judgment.

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IV. It is perfectly consistent with the complaint, that as a matter of justice and equity between the parties, the defendants are entitled to retain this money. The plaintiff nowhere claims that the money is his, or that the defendants have no right to it.

V. The difficulty suggested, as to the plaintiff's relief in the other action, in case of another judgment against him, will not, it is claimed, exist. The process of the court, by which alone the new judgment could be collected, is at all times under the control of the court; and upon motion showing that at any previous stage of the action the sum in controversy had been actually received by the plaintiffs therein, the court would direct execution to issue only for the costs.

Philip S. Crooke, for the plaintiff. I. The party paying a judgment, which is subsequently reversed, may have restitution, on reversal, and may maintain an action to recover the amount paid. (*Bank of U. S. v. Bank of Washington*, 6 *Peters*, 8, and cases cited.)

II. If a judgment is reversed on error, the party shall be restored to all he has lost. (*Com. Dig. Pleader*, 2, 3, *B.* 20.)

By the Court, EMOTT, J. This would have been an action for money had and received, before the code abolished all forms of action, or rather their names. An action for money had and received by the defendant to the use of the plaintiff lay whenever the defendant withheld from the plaintiff money, which justly and equitably belonged to him. In the language of Lord Mansfield, in *Moses v. Macfarlane*, (2 *Burr.* 1009,) "it lay for money which, *ex æquo et bono*, the defendant ought to refund." In that case that distinguished judge permitted the application of the action, and of the principles upon which it proceeded, to the recovery of money which had been unjustly and unconscientiously recovered of the plaintiff in a suit in another court, while the judgment in that suit remained unreversed and in force. It is now conceded that this was going

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too far. The first judgment ought to have been conclusive between the parties, and the case was one for the application of the maxim, "*interest reipublica ut sit finis litium.*" *Marrriot v. Hampton* (7 T. R. 269) was decided on this ground, and this is the settled law. It will be observed that in both these cases the judgments under which the money was paid stood in force and unreversed, and the second action was an attempt to overhale the merits of a controversy once tried. The question of the voluntary or coercive character of the payment was not the turning point of the decision in either case.

There is another class of cases where the money for which the action is brought has been obtained from the plaintiff by coercion, or the use of illegal or invalid process. In these it is of the highest consequence to know whether the plaintiff submitted voluntarily to pay the money, or was compelled to do so by duress of his goods or person. Because, if the payment was made with a knowledge of the facts, voluntarily, then the rule is *volenti non fit injuria*. In cases of wrongful payment, in general, unless there be a mistake of the facts or undue advantage taken of a man's situation to extort or coerce payment, it must be final. But these again are cases in which there is no judicial action affecting the rights of the parties intermediate the payment and the action for restitution; in other words, where the demand was unfounded and the payment illegal, alike at the time of the payment and at the time of the suit. The books are full of instances of this sort—actions to recover money paid upon illegal and unconscientious demands, either upon process or without it—and the main question in such cases is, whether the payment was voluntary or compulsory. Many of the earlier cases are reviewed in *Mowatt v. Wright*, (1 Wend. 355.) See also *Hall v. Shultz*, 4 John. 240; *Fry v. Lockwood*, 4 Cowen, 454; *Waite v. Leggett*, 8 Cowen, 195; *Ripley v. Gelston*, 9 John. 200; *Silliman v. Wing*, 7 Hill, 159; *Supervisors of Onondaga v. Briggs*, 1 Den. 26. See also *Flectwood v. City of New York*, (2 Sandf. S. C. R. 475,) in which it was held that there cannot be legal duress or compul-

sion of property, where the property liable to be affected by the claim or process is real estate. The same principles will be found in *Corlies v. Waddell*, (1 Barb. S. C. R. 355,) and in the recent case of the *New York and Harlem Rail Road Co. v. Marsh*, (2 Kern. 308.) Suits to recover back money paid on an erroneous and subsequently reversed judgment, belong to a different class and proceed on different principles. I find three of these cases. These are *Clark v. Pinney*, (6 Cowen, 297,) and *Sturgis v. Allis*, (10 Wend. 355,) in our own courts, and *Bank of the U. S. v. Bank of Washington*, (6 Peters, 8,) in the supreme court of the United States. In the first of these cases the court say the money was collected on an erroneous judgment; this judgment having been subsequently reversed, the inference is irresistible that it belongs to the person from whom it was collected, and the only question is as to the remedy. There was an execution issued in this case, but the defendant paid it to the sheriff by a note of third parties, and it is not stated that there was an actual levy, or that the payment was compelled, that the plaintiff might get his goods. So in *Sturgis v. Allis* the payment was made upon an execution, but not to obtain a release of the goods. I suppose that in both these cases, if the judgments had not been reversed, but the process had been illegal or the judgments invalid for any collateral reason, the money might not have been recovered back, because it was a voluntary and not a strictly coerced payment in the eye of the law. It is not sufficient to constitute duress or coercion, that the defendant should have been armed with the means of compelling payment: the payment must have been strictly compelled. It is the duress of goods which the cases recognize, where the plaintiff submits to an unlawful exaction to obtain or reclaim his property actually seized. In the *New York and Harlem R. R. Co. v. Marsh*, (2 Kern. 308,) the defendant was a collector, armed with a warrant, and with power to seize property to pay the tax. But the plaintiffs paid him the tax, on his demand at their office, out of his jurisdiction, and were there-

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fore held to have paid it voluntarily, and to have precluded themselves from contesting the rightfulness of the tax, in an action to recover it back. It is not enough, therefore, in cases where the positions and rights of the parties have not been altered since the payment, that the payment might have been coerced: it must have been actually compelled by duress of persons or goods.

As we have seen, however, the rule is not so laid down in cases of payments on erroneous and subsequently reversed judgments. The case of the *U. S. Bank v. Bank of Washington* illustrates this more clearly. There the payment was made upon an execution which was forwarded to the defendant by a corresponding bank, for collection. The court say that upon the reversal of this judgment, on which the execution issued, the law raises an obligation on the part of the person who has received the benefit of it, to make restitution; and the principal point discussed in the opinion of Judge Thompson there, as in that of Judge Sutherland in *Clark v. Pinney*, (*supra*,) is whether the only remedy is a writ or order of restitution, or a scire facias, or whether an action will lie. These cases are all of them in point to show that the remedies are cumulative, and that the action will lie. I think they also sustain the position that where money has been collected or received upon a judgment valid at the time and binding between the parties, and that judgment has been reversed subsequently, the money may be recovered back, although the payment may not have been coerced by actual duress. We ought not to say that a party must resist the judgment of a court to the last extremity, and with what is something like contumacy, if he wishes to preserve his right to restitution in case he succeeds in reversing the judgment. Where a man pays without coercion and with knowledge of the facts of his case, he cannot be heard afterward to say that upon these facts he ought not to have been called upon for payment. That is undoubtedly a settled rule of law. But that supposes that he claims restitution upon

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the same state of facts which existed when he paid the money. When however the payment is made in obedience to the judgment of a court which had determined that he must pay it, and that his adversary had the right to demand it of him, and subsequently a legal tribunal of competent authority adjudges that the first judgment was erroneous, and therefore vacates and reverses it, the conclusion is irresistible that the plaintiff in the first judgment, if he has received its amount, has received what he is equitably and justly bound to restore. The court ought not to refuse its aid to compel such restitution; and the fact that under our present practice the appellate court may direct it in reversing the judgment, (*Code*, § 330,) while it shows that the appellant need not wait for actual compulsion and duress before he obeys the judgment from which he appeals, while it is standing in force, does not take away the right of action given by the common law.

The distinction between such a case, and those where actual duress is required to be shown, is that in the latter the plaintiff has paid a demand which was wrongful at the time, and he is foreclosed from showing its wrongfulness afterwards, unless he was compelled to pay it; while here, the demand was rightful at the time, and so long as the original judgment remained unreversed. The obligation of the defendant to restore the money was created subsequently when that judgment was reversed, and it is upon that state of facts, and that too produced by judicial action, that the plaintiff's present rights depend.

The complaint in this action alleges the payment simply, but the presumption is that it was in obedience to the judgment, and not as a compromise or settlement. It then alleges the reversal of the judgment, and upon these facts the action was well brought. If the case is to be varied it must be by the answer.

The judgment must be affirmed.

[KINGS GENERAL TERM, February 14, 1859. S. B. Strong, Emott and Brown, Justices.]

THE PEOPLE, *ex rel.* George Staats and Jacob Staats,
vs. LYMAN TREMAIN, Attorney General, &c.

Where an alternative mandamus, directed to the attorney general, commands him to certify that certain suits in the name of the people, in which costs were adjudged to the defendants, were duly instituted as by law required, and the attorney general, in his return, states that no appropriation has been made, by the legislature, for the payment of such costs, which allegation is admitted by demurrer, a peremptory mandamus will not be granted.

So held in respect to costs adjudged to the defendants in suits brought by the district attorney of Kings county, for penalties under the Metropolitan Police Law. S. B. STRONG, J. dissented.

A mandamus will not be granted, where it would be fruitless, and ineffectual to relieve the relator. Nor, when the object is impossible of attainment, should the court compel a single step towards it.

The constitutional prohibition against the payment of any moneys out of the state treasury, except in pursuance of an appropriation by law, is a sufficient reason for denying a mandamus to compel the making of a certificate by the attorney general to enable the relator to obtain payment, out of the treasury, of a claim for which no appropriation has been made.

MOTION for a peremptory mandamus; heard upon demurrer to the defendant's return to the alternative mandamus.

C. J. Jack, for the relators.

L. Tremain, attorney general, in person.

EMOTT, J. The fourteenth section of the seventeenth title of part third, chapter eight, of the revised statutes, directs that whenever costs are adjudged against the people of the state in any civil suit or proceeding instituted by any officer duly authorized for that purpose, it shall be the duty of the comptroller to draw on the treasurer for the amount thereof, upon the production of an authenticated copy of the judgment record, etc., and upon a certificate of the attorney general that such suit or proceeding was duly instituted as by law required. This is a mandamus to compel the attorney general to certify, pursuant to this section, that certain suits for penalties, un-

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der the Metropolitan Police Law, were duly instituted. In the return to the alternative writ, the defendant states that no appropriation has been made by the legislature for the payment of these costs, and this allegation is admitted by the relator by the demurrer. The present constitution of the state provides (*Art. 7, § 8*) that no moneys shall ever be paid out of the treasury of the state, or any of its funds, except in pursuance of an appropriation by law. It will be seen, therefore, that upon the facts presented, the payment of the costs in question cannot be made, nor compelled, from the treasury. This presents a question which I think will dispose of the case, without adverting to any of the other points which were argued.

It will be observed that the statute does not require the defendant to make the certificate in question, but it commands the comptroller to draw his warrant upon the treasurer, on the production of the proper evidence of the amount of these costs, accompanied by the attorney general's certificate. The learned judge, at special term, held that this provision, that an act of a public nature should be performed by the comptroller upon the performance of another act by the attorney general, was equivalent to a direction that the latter act should be done by this officer. Admitting this to be so, and that certifying under this statute is an act properly controllable by mandamus, both of which are propositions which I mean to pass without examination, as they are not material in the view I take of the case; admitting, I say, both these propositions, it is obvious to us that the duty of the attorney general can only be commensurate with that of the comptroller. When a case is presented, in which, with the certificate before him, it would be the duty of the latter officer to draw his warrant; it would be the duty of the former to certify. But when the comptroller ought not and could not draw his warrant, with the certificate, the attorney general ought not to make the certificate. Are we to be called upon to compel one of these officers to make a certificate which the statute says shall be sufficient to impose upon the other the duty of drawing his warrant on the

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treasury, and which is intended for no other purpose ; and yet, after this is done, at the next step deny our assistance and refuse to direct the warrant ? We are thus to refuse to compel obedience to the final and effectual mandate of the statute, after having compelled a compliance with all its preliminary requirements. Or to put the case otherwise, why should we compel a compliance with these preliminaries when we see that we cannot command the act in which they are to result ? In the case of *The People ex rel. Woodworth v. Burrows*, (27 Barb. 89,) this court, sitting in the third district, held that where the treasurer could not pay a warrant, the comptroller would not be commanded to make it. The ground upon which a mandamus against the comptroller was refused, in that case, was precisely that which exists here, namely, that there was no appropriation, and therefore the treasurer could not pay the warrant if made. I feel no dissatisfaction with that decision ; on the contrary, it is founded upon a well settled rule, which is as decisive of this case as it was of that. If we refuse to compel the comptroller to draw the warrant because the treasurer ought not to pay it, it is equally clear that we must refuse to compel the attorney general to certify because the comptroller ought not to draw. It is plain that the defense is as available by one of these officers as the other. The attorney general may as well set up the impropriety of the comptroller making the warrant as a reason why he should not certify, as the comptroller allege that the treasurer cannot pay, as a reason why he should not sign the warrant.

The inability of the treasurer to pay this bill of costs, or rather the constitutional inhibition upon his paying it, is a sufficient reason why this mandamus should be denied. When the end cannot be accomplished, none of the machinery should be set in motion. The object of all the provisions of the statute is to regulate and provide for the payment of such claims out of the public treasury, in the manner prescribed by law, and none of the proceedings which the statute contemplates is to be used for any other purpose than as one step in

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an orderly procedure to that end. When that object is impossible of attainment, we should not compel a single step towards it. The court will not grant a mandamus where it would be fruitless and ineffectual to relieve the relator. (*Tapping on Mandamus*, 67. *The People v. Supervisors of Greene Co.*, 12 Barb. 217. *The Same v. Burrows*, *qua supra*.) And by this is meant that the aid of the court will be refused when its writ will not finally avail the party, or protect his rights, when he has no right to the ultimate relief to which his proceedings tend, or cannot redress his grievance in the proceeding which he seeks to institute. Many authorities might be cited to this point, but it would be a waste of time to search for them. We do not sit to decide abstract questions, or to promulgate our opinions in authoritative form for some future, it may be, indirect use or reference. Our duty is to administer the remedies which the law and the constitution afford to suitors, according to the rules which the law and the constitution prescribe.

It is said that we may presume that at some future time an appropriation will be made by the legislature for the costs in these and similar actions, and that the forms and proceedings which we are asked to compel the public officers to go through with, although fruitless now, may become effectual then. The answer is that we are to decide this case by the facts as they exist now, and as they are placed before us. If the relator fails on these, he cannot sustain himself by conjectures of what is possible or probable in the future.

A peremptory mandamus is denied, and the defendant must have judgment with costs.

LOTT, J. and BROWN, J. concurred.

S. B. STRONG, J. dissented.

Peremptory mandamus denied.

[KINGS GENERAL TERM, February 14, 1859. *S. B. Strong, Lott, Emott and Brown*, Justices.]

GRAVES *vs.* BERDAN.

When the estate out of which rent issues is gone, and the demised tenement has absolutely ceased to exist, the rent must terminate, and the obligation to pay it is at an end.

Where the plaintiff leased to the defendant certain rooms and passage ways in the basement, the ground story and on the second floor of a building, for a term of years, taking from the lessee a covenant to pay the rent, but not covenanting to rebuild; and the building was afterwards accidentally destroyed by fire, and no erection was substituted for it by the plaintiff of a height equal to the second floor of the former edifice, or upon that part of the ground which was covered by the stores occupied by the defendant; *it was held* that the lease was to be construed as a lease of apartments—of a portion of a building only—and that the destruction of such apartments constituted a good defense to an action upon the covenant, for rent subsequently accruing. S. B. STRONG, J., dissented.

APPEAL by the defendant from a judgment of the city court of Brooklyn. The action was brought to recover a quarter's rent claimed to be due upon a lease executed by the plaintiff to the defendant. The plaintiff had judgment for the amount claimed, with costs.

E. H. Kimball, for the appellant.

D. C. & J. Winslow, for the respondent.

EMOTT, J. The defendant hired of the plaintiff certain rooms and passage ways in the basement, the ground story and on the second floor of a large building in Brooklyn, by a lease under seal for a term of five years from May 1, 1856. The same building was occupied by a number of other persons, to whom different apartments were separately let. The lease contained a covenant by the defendant, to pay the rent. The building was accidentally but completely destroyed by fire on the 6th day of May, 1857, and no erection has been substituted for it by the plaintiff of a height equal to the second floor of the former edifice, or upon that part of the

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ground which was covered by the stores occupied by the defendant. Neither party covenanted to rebuild, but the present action is brought upon the covenant in the lease for the payment of rent. The defense interposed is the destruction of the building; and the question is, whether that is a good answer to the action.

The plaintiff contends for the application of the rule that where a party by his own express contract engages to do an act, any subsequent casualty, even though inevitable, or occasioned by what the law styles the act of God, will not relieve him from its performance, or from making the other party good, if performance becomes impossible. That is a rule well settled, and strictly adhered to in the common law. It is recognized, and the authorities in which it appears are adverted to in the recent case of *Harmony v. Bingham*, (2 *Kern.* 99, 107, 115.) There is no class of cases in which that rule has been applied with more strictness and occasional harshness than those of leases, and the rights of landlords to rent. Where there is an express covenant to pay rent, in a lease of lands, neither the destruction of buildings by fire, nor the inundation of the property by water, nor its occupation by the enemy, will exempt the party from his obligation. There is an unbroken series of decisions to this effect, commencing with *Paradine v. Jane*, (*Alleyne*, 26,) in which Justice Rolle, in an action of debt for rent, overruled a plea that the defendant had been excluded from the premises by the public enemies, to wit, Prince Rupert and his soldiers. That doctrine has been rigidly upheld. (2 *Strange*, 763. 2 *Ld. Raym.* 1477. 1 *T. R.* 310, 705. 3 *Burr.* 1638. 4 *Taunt.* 45.) In *Hallett v. Wylie*, (3 *John.* 44,) it was asserted by the supreme court in this state, and has never been departed from. Nor will a court of equity relieve against the payment of the rent, in such cases. (3 *Anst.* 687. 18 *Ves.* 115. 1 *Sim.* 146.)

But in all these cases, it is to be observed that the estate still continues, the thing demised exists, and the interest of

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est in the land passes, or rather, after the destruction of the buildings and apartments demised, no interest in the land remains. As long as the building stands, it is a part of the land, annexed to it, so that a contract for, or a demise of, a portion of the building is undoubtedly, in the eye of the law, a contract relating to that which is regarded as land by its annexation to the soil. This explains the application of the statute of frauds to such contracts, as in the cases cited by the plaintiff's counsel and others. That a cellar or an apartment in the first or fourth story of a building, a room in the edifice with a passage or right of way may be demised separately and nothing more pass, is clear from old authorities, as well as from the recent cases. (5 Co. 100. 1 T. R. 701.) Any other doctrine would be absurd in its application to buildings consisting of many floors or stories, one above the other, and separately demised. In such cases it is the rooms in the buildings which pass, and nothing more. It cannot be the ground under them, for that is common to all, or is occupied by the structure which supports all alike. How could this be said to belong to one more than another, or be divided among them all? And it will not be said that the mere space of air above the ground passes by the lease, or that after the building is gone the tenant may assert his right to the space which his apartment occupied, in mid air, if he can reach it. The reasonable construction of such a lease as the present is, that it is a lease of apartments—of a portion of a building only. Therefore with the destruction of the building the estate and thing demised were destroyed, as what is literally and actually land never can be. With this destruction of the estate the tenement out of which the rent was to issue ceased, and the obligation to pay it was at an end. There was therefore no liability to pay the rent which would have accrued in August after the fire.

There are some other considerations which may have some force against the plaintiff's action, but I forbear to advert to

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them, as, in the view which I take of the case, what I have already said, must dispose of it.

The judgment should be reversed, and a new trial in the city court ordered, the costs to abide the event.

BROWN, J. concurred.

S. B. STRONG, J. dissented.

Judgment reversed.

[KINGS GENERAL TERM, February 14, 1859. *S. B. Strong, Emott and Brown*, Justices.]

MARTHA HALL vs. BURDETT STRYKER, Sheriff of Kings county.

A person claiming to be a creditor, with a warrant of attachment under the code, but with no judgment or execution for his debt, has no standing in court which will enable him to impeach and litigate the *bona fides* of a sale of goods by the alleged debtor, to a third person, which has been consummated by transfer and delivery of the possession before the lien of the warrant attached.

To enable a party to question and put in controversy the *bona fides* of a sale of goods, it must appear affirmatively that he is a creditor of the vendor. Not merely that he is a person claiming a debt or obligation due to him from the vendor, which he proposes to establish by proof; but the character in which the attacking party prosecutes the action, or interposes the defense, and claims to overthrow the sale or conveyance, must be settled, and put at rest, by the judgment or decree of a competent court.

THIS was an action to recover the value of certain household furniture, alleged to have been seized and taken away by the defendant, as sheriff of King's county. The answer put in issue the taking, and also justified, under an attachment issued out of the supreme court in favor of one

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Dewitt C. Hay, against Robert Hall; claiming that the property taken was the property of said Robert Hall. The jury found a verdict in favor of the plaintiff for \$1178.96, and the court thereupon ordered that the exceptions taken at the trial should be heard in the first instance at a general term, and judgment be there rendered.

J. M. Van Cott, for the plaintiff.

S. P. Nash, for the defendant.

By the Court, BROWN, J. The plaintiff claimed to recover the goods in controversy under a bill of sale, duly executed to her by one Robert Hall, who was the owner at the time. The bill was executed and delivered on the 30th November, 1857, and the object of the parties to the instrument was to secure to the plaintiff the sum of \$1000 due to her from the vendor. The defendant is the sheriff of the county of Kings, and he justified, or claimed to justify, the taking of the goods under a warrant of attachment, issued by the Hon. Thomas W. Clerke, one of the justices of this court, in an action pending therein, wherein one Dewitt C. Hay was plaintiff and Robert Hall, the vendor of the goods, defendant. The warrant was issued on the 30th day of November, 1857, and the proof showed that the goods were seized and taken from the possession of the plaintiff at Flatbush, in the county of Kings, on the 1st day of December, 1857, thereafter. Various questions were raised and decided in the progress of the trial; such as, the force and effect of the assignment under which Hay, the plaintiff in the warrant of attachment, claimed the debt as assignee; and as to the proof of the debt and the sufficiency and admissibility of the affidavits to authorize the issuing of the warrant, which it is not necessary to notice further, because the judge tried the cause, throughout, upon the rule that the plaintiff in the warrant of attachment had

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no standing in court, to enable him to litigate the question of fraud in the sale from Robert Hall to the plaintiff, which was the sole defense to the action. All the other questions were subordinate to, and dependant upon, this; and if the judge was right in his view of the law, the judgment should stand, and if not, it should be reversed. I shall examine whether a person claiming to be a creditor, with a warrant of attachment under the code, but with no judgment or execution for his debt, has a standing in court which will enable him to impeach and litigate the *bona fides* of a sale of goods by his alleged debtor to a third person, which has been consummated by transfer and delivery of the possession, before the lien of the warrant attached. It is worth while to consider it briefly upon principle, before looking at the authorities.

Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, &c., made with intent to hinder, delay or defraud creditors, &c., as against the persons so hindered, delayed or defrauded, shall be void; not absolutely and positively void, but void in a limited and qualified sense; in another sense, good and valid, and sufficient to pass the title: good as against the vendor or assignor, and those claiming under him, (except in the special case of his personal representatives,) but void and of no effect as to his creditors who have been hindered, delayed or defrauded by the sale or conveyance. In short, such sales and conveyances are voidable at the suit of a creditor of the vendor; and if no creditor interposes and complains, they are as binding and effectual to pass the title as if made with the best intents and for the most innocent and commendable purposes. To enable a party, therefore, to question and put in controversy the *bona fides* of a sale of goods, it must appear affirmatively that he is a creditor of the vendor. Not merely that he is a person claiming a debt or obligation due to him from the vendor, which he proposes

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to establish by proof; because if it is to be established by proof, it may be repelled by proof, and thus the principal fact which lies at the foundation of the whole proceeding would be suspended in doubt. But the character in which the attacking party prosecutes the action, or interposes the defense, and claims to overthrow the sale or conveyance, must be settled and put at rest by the judgment or decree of a competent court. Any other rule than this would put in issue in the same cause two separate and incongruous questions; one upon the existence of the debt, and the other upon the good faith of the sale; and in the first of which the proper parties would not be before the court. In the present case Dewitt C. Hay, the plaintiff in the warrant of attachment, claimed to be a creditor of Hall, the vendor of the goods, as assignee of one Frank Hay, who claimed to hold the debt as assignee of Angus Cameron, the original creditor. These facts the sheriff proposed to prove upon the trial; and if it was competent for him to prove that Hall was debtor to Cameron, who had assigned to Frank Hay, and that the latter had assigned to Dewitt C. Hay, it was also competent for the plaintiff to disprove them, if he was able. And thus, before the parties could reach the question of fraud, in the progress of the trial, all the other questions raised would necessarily have to be examined and determined, and that too in the absence of Robert Hall, the debtor, who was not a party to the action. Courts of law have not usually taken cognizance of issues so dissimilar and incongruous, in the same action.

The warrant of attachment may issue according to chapter 4 of the code, in an action for the recovery of money, whenever it shall appear by affidavit that a cause of action exists against the defendant; that the defendant is either a foreign corporation or not a resident of this state, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent; or has removed, or is about to remove, any of his

property from this state with intent to defraud his creditors ; or has assigned, disposed of, or is about to dispose of or secrete his property with like intent. Security is to be given by the plaintiff to pay the damages and costs to be sustained by the defendant in the action, by reason of the attachment, if the plaintiff fails to recover. The directions of the warrant are that the sheriff attach and safely keep all the property of the defendant, within his county, to satisfy the plaintiff's demand. These provisions indicate no intention to give to the creditors of a vendor of real or personal estate any new or additional remedy against his alleged fraudulent vendee ; because the security given upon granting the warrant is to indemnify the defendant therein, and not the person who has purchased the property, and from whose possession it is taken by the sheriff ; and also because the defendant may have an order to discharge the warrant of attachment, upon giving the requisite security, pursuant to sections 240 and 241, and then the property is to be delivered over to him, and not to his vendee, from whom the sheriff may have taken it. Besides, the warrant of attachment may be issued upon the sole ground of non-residence ; and it could not have been intended to give to persons claiming to be creditors of non-resident debtors rights against third persons, in respect to fraudulent sales, which are withheld from those claiming to be creditors of resident debtors in respect to the same thing. If the right to pursue the goods into the hands of a purchaser, and try the question of fraudulent intent before the question of creditor is established, and the claim has assumed the form of a judgment and execution, exists as to the creditors of one class of debtors, it must exist as to all, resident as well as non-resident. The warrant of attachment, and the affidavits upon which it issued, establish nothing as to those not parties to the action. So far as purchasers from the defendants therein are concerned, they do not entitle the plaintiff to the character and rank of a creditor ; and until he puts himself in that position, by obtaining the judgment or decree of some competent court in his favor, he

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cannot be heard, in an action, to impeach for fraud and bad faith a sale made by his pretended debtor.

The court of chancery will not lend its aid to a creditor to obtain satisfaction of his debt out of property not liable to be levied upon by execution, unless he shows a judgment recovered and an execution thereon returned unsatisfied. He must first exhaust his remedy at law. Nor will the court lend its aid to remove an obstruction or impediment interposed to the collection of his debt, unless he also shows a judgment docketed, if the subject sought to be recovered is real estate, or an execution issued, if the subject is personal estate, and which would have been a lien but for the obstruction which he seeks to remove. (*Crippen v. Hudson*, 3 Kern. 161. *McElwain v. Willis*, 9 Wend. 548.) These principles, familiar to every practitioner, serve to show the certainty which the law requires when the creditor seeks to impeach the transactions of his debtor with third persons. To entitle a party to avoid a deed as fraudulent in respect to creditors, he must claim under a valid judgment. (*Jackson v. Cadwell*, 1 Cowen, 622. *Coleman v. Crooker*, 1 Vesey, 160. *Bean v. Smith*, 2 Mason, 282.) In *Lake v. Billings*, (1 Lord Raym. 733,) trespass was brought against the sheriff for goods taken. Upon not guilty pleaded, he gave in evidence that he levied on them in execution, by virtue of a *feri facias*. The plaintiff made title by a prior execution, but fraudulent, and by a bill of sale made of them to him by the officer, viz. the sheriff's predecessor, to the defendant. And upon the trial it was ruled that the defendant ought to give in evidence a copy of the judgment. But it would have been otherwise, if trespass had been brought by the person against whom the *feri facias* issued. In the case of *Martyn v. Podgie and others*, (5 Burrow, 2631,) the plaintiff claimed the goods under a bill of sale from William Martyn, which was said to be fraudulent, and the defendant justified under a writ of *feri facias* issued against William Martyn. The court, by Lord Mansfield, held that it was necessary to produce the judgment. See

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also *Ackworth v. Kempe*, (*Doug.* 40,) where the same rule was applied upon the trial, and afterwards approved at bar, in regard to one of the writs of *feri facias*, under which the defendant attempted to justify the taking of the goods. In *Parker v. Walrod*, (16 *Wend.* 514,) decided in the late court of errors, Chancellor Walworth says, "In the three cases last quoted, and also in *High v. Wilson*, (2 *John. Rep.* 46,) the plaintiffs showed title in themselves derived from the defendant in the execution before the lien of the execution attached thereon. The execution itself, therefore, was no defense to the officer, who could only make it available against a stranger to it by connecting it with a judgment, and then showing that the transfer of the property to the person thus claiming was fraudulent and void as against the creditors who had recovered the judgment. In this view of the subject, it will be seen that the cases referred to may be sustained upon principle, as the production of the judgment record was necessary to establish the fact that the execution issued upon a judgment rendered for a cause of action which existed, or for a debt contracted, before the issuing of the execution; otherwise there would have been no creditor as against whom the transfer of the property could have been fraudulent." In *Frisbey v. Thayer*, (25 *Wend.* 396,) the question was between the landlord of the owner of the goods, with the right to distrain and to follow the goods, and a mortgagee who had removed them from the demised premises within 30 days. The point was taken that as there was no change of the possession, the mortgage was fraudulent. Nelson, Ch. J., in regard to this question, says, "Neither does the statute (2 *R. S.* 70, § 5) making mortgages void as to creditors and subsequent purchasers apply, as the question there can only arise between judgment creditors and the mortgagee. A distress warrant does not stand on the footing of a judgment and execution." The warrant of attachment directs the sheriff to attach and safely keep the property of the defendant, sufficient to satisfy the plaintiff's demand; and the writ of *feri facias* or execution

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also directs him to satisfy the plaintiff's judgment out of the personal property of the defendant—not the property which he has sold and delivered over to another before the lien of the process has attached. In no sense can property so sold and transferred be deemed the property of the defendant in the execution or warrant of attachment. As against him the title of the purchaser is perfect and complete. The law may adjudge that such property shall be appropriated to the payment of the vendor's debts; but it does so upon the principle, that in equity and justice it belongs to his creditors.

I therefore conclude that the judge was right in excluding the evidence offered by the defendant, to show the indebtedness from Robert Hall to Angus Cameron, and also when he instructed the jury that the only questions in issue were the taking of the property by the defendant, the title of the plaintiff to it, and its value.

The judgment should be affirmed.

[KING'S GENERAL TERM, February 14, 1859. *Lott, Emott and Brown, Justices.*]

WILLIAM D. EVERITT and others vs. ROSINE EVERITT
and others.

A testator, after giving directions as to the payment of his debts, the disposition of his business, the conversion of his estate into money, and investing the same on bond and mortgage, and for the payment of certain legacies after the expiration of one year from the time of his death, by the 10th clause of his will, directed that the remainder of his estate, and the accumulations thereof, should be held, used and managed by his executors for the benefit of such of his three younger children. R., M. and A., as should be living at the time of his death. And if the said children should have attained the age of 21 years at the time of his decease, then his executors were to pay over the remainder of the funds, and all accumulations thereon, to his said three younger children or to the survivor of them, (if one of them should

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then be dead,) in equal proportions, share and share alike. And if there should be but one survivor at the time of his decease, then the executors were to pay over the remainder of the funds, and all the accumulations thereon, to his said three younger children or to the survivors of them, (if one of them should then be dead,) in equal proportions, share and share alike. And if there should be but one survivor at the time of his decease, then the executors were to pay over to such survivor the whole of such funds, and the accumulations thereon. The testator then directed that if he should depart this life while any of the said younger children should be under the age of 21 years, the executors should hold, use and manage the said residue and remainder of the trust funds, as before provided, until all of his said three younger children, or the survivor or survivors of them, should become of age; and then he directed his executors to pay over such funds, and the accumulations, to them or to the survivors of them, in the same manner and in the same proportions as before provided in case of his not dying until after the youngest one living at the time of his decease should become of age. The testator died before either of the three younger children attained the age of 21.

Held that the trust created by the 10th clause of the will was of the entire estate, and not a trust of each of its three separate parts. And that the absolute power of alienation being by possibility suspended for a longer period than two lives, the whole limitation was void.

APPEAL from a judgment or decree entered at a special term. The action was brought by William D. Everitt, Euphemia Wallace and William J. Wallace, three of the children and heirs at law of Charles G. Everitt, deceased, against Rosine Everitt, Margaret Ann Everitt and Alice Everitt, three infant children and heirs of the deceased, and John A. Bryan, sole acting executor, to set aside the last will and testament of the said Charles G. Everitt. By the decree and judgment made at the special term it was declared that the tenth clause of the will created one entire trust of the whole estate, and not a separate trust for each of the three younger children of the testator, and was consequently illegal and void; and it was adjudged and determined that the testator died intestate as to the residue and remainder of his estate intended to be devised and bequeathed by the said tenth clause of the will. From this decree the defendants appealed.

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Jesse C. Smith, for the plaintiffs.

Wm. L. F. Warren, for the defendants.

By the Court, BROWN, J. In the case of *Paterson v. Ellis*, (11 *Wend.* 260,) to which we were referred by the appellants' counsel, upon the argument, there were two principal questions considered and determined by the court. 1st. Whether the legacy which was the subject of the controversy vested in Mrs. Paterson. 2d. Whether it was not divested by her death under age and without lawful issue. Upon the first question the court determined that although the legacy was not given in express words, it was given in substance, because, 1st. It was separated from the body of the testator's estate; 2. It was to be invested at interest in the name of Mrs. Paterson; 3d. Guardians of her estate were appointed by the will; 4th. The interest was appropriated to her use, and was to be invested for her benefit; and 5th. The whole was to be paid to her when twenty-one years of age. Upon the second question, the court determined that the legacy was not divested by her death under age and without lawful issue; because the words of limitation imported an indefinite failure of issue and created an estate tail at the common law, and as personal estate could not be entailed, the first taker was held to have the whole property. It will be seen, from an examination of the report of the case, that a gift of the income for support and maintenance was only one of the circumstances from which the intention to vest the principal might be inferred. *Paterson v. Ellis* is distinguished from the present case by the circumstances that it relates to a single legacy given to a single person and invested in her name. It furnishes no expression of opinion upon the subject of a trust for the benefit of a class of persons, with limitations over to the survivor or survivors in the event of either dying before 21 and without issue. The case of *Tucker v. Bishop*, (16 *N. Y. R.* 402,) to which we were also referred, has less analogy to the present

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case than that of *Paterson v. Ellis*. There the executors were directed to invest the proceeds of the property in safe and sufficient securities, "one half of which sum, principal and interest, shall be for the benefit of the children of Jane A. B. Tucker; and the other half, principal and interest, shall be for the benefit of the children of Augustin B. Childs. The executors were further directed to apply one half of the interest and income, annually, for the benefit of the children of Jane A. B. Tucker, and the other half to the children of Augustin B. Childs; and whenever either of the children of the said Jane shall come of age, my executors are to pay over to that child her or his proportion of the one half of the principal; and whenever either of the children of Augustin B. Childs shall come of age, to pay to such child his proportion thereof, and so till the whole principal and interest is paid out and expended." The court held this language to manifest a clear intention to make a present bequest of the residue of the estate; one half to the children of Tucker and the other half to the children of Childs. That the bequest to each class was due presently, though payable in future; and that the time of the payment did not postpone the vesting of the legacy, because it was not of the substance of the gift. That the period of the distribution of each moiety was the time when the eldest child of each class became of age; and all children born intermediate that time and the time of the death of the testator were entitled to share in the fund. That "the uncertainty of the quantity of the interest of the children *in esse* at the death of the testator, growing out of the possible diminution of their shares, by subsequent births, could not have the effect of suspending the power of alienation. Whatever interest the children *in esse* at the death of the testator had in the fund at any time prior to the majority of the child who first attained 21, whether diminished in quantity by augmentation of the numbers of the class, or not, was susceptible of alienation by next friend or guardian acting under an order of the court." Here also, although the fund was given to a class, there was

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no limitation over to survivors, and no uncertainty in respect to the right of the children in being at the time of the death of the testator to take the estate, although the extent of their interests might be diminished by the births intermediate the death of the testator and the time when the eldest of each class attained the age of 21.

In the present case, the testator, in the first nine clauses of his will, gives directions in regard to the manner of the interment of his body, the payment of his debts and the disposition to be made of his business, in respect to the conversion of his estate into money, and investing the same at interest upon bond and mortgage. And after the expiration of one year from the time of his death, his executors are required to pay from the property certain legacies to his relatives and employees. By the 10th clause, he directs that the remainder of his estate, and the accumulations thereof, shall be held, used and managed by his executors for the benefit of such of his three younger children, Rosine Everitt, born June 7th, 1842, Margaret Ann Everitt, born January 18th, 1850, and Alice Everitt, born October 4th, 1851, as shall be living at the time of his death. And if the said children should have attained the age of 21 years at the time of his decease, then his executors were to pay over the remainder of the funds, and all accumulations thereon, to his said three younger children or to the survivors of them, (if one of them shall then be dead,) in equal proportions, share and share alike; and if there should be but one survivor at the time of his decease, then the executors were to pay over to such survivor the whole of such funds and the accumulations thereon. The testator died on the 7th July, 1856, and by reference to the ages of the children it will be seen that the contingency referred to in this passage never happened, for the testator died before either of the children attained the age of 21. He then proceeded to direct, that "if I shall depart this life while any of the said younger children shall be under the age of 21 years, it is my will, and I do direct my said executors to hold, use and man-

age the said residue and remainder of the said trust funds, as hereinbefore provided, until all of my said three younger children, or the survivor or survivors of them, shall become of age. And then it is my will, and I do direct my said executors to pay over such funds, and the accumulations, to them or to the survivors of them, in the same manner and in the same proportions as above provided, in the case of my not departing this life until after the youngest one living at the time of my decease should become of age." It is to be observed that the trust was of the entire residue and remainder of his estate, and not of the separate parts of such residue and remainder, and that it was not separated and invested in the name of the *cestuis que trust*, as in the case of *Paterson v. Ellis*, but was invested in one mass in the name of the executors. Nor were the shares of each of the children to be paid to them as they respectively attained the age of 21 years, as in the case of *Tucker v. Bishop*; but the entire trust fund was to be retained in the hands and in the name of the trustees until all the children, or such as survived, attained the age of 21 years, and then it was to be distributed to the survivors. In a subsequent part of the will he enjoins it upon his executors to apply the income arising from the trust property to the support, education and maintenance of each and every such minor during her minority; and if the income proves insufficient for that purpose, they are to resort to the principal of the fund, to the end that there shall be no failure under this provision of the will. These expenditures are expressly charged upon the trust fund generally, and not against the shares of such minors separately. In another and subsequent part of the will he also directs that if any of such children should die before she shall become entitled to be paid in full the amount coming to her for her share, and shall leave lawful issue, her share shall immediately belong to and go to such issue; but if she shall die without such issue, then her share shall go to the survivor of his said three youngest children. The effect of this limitation is to create an additional obstacle to the

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alienation of the estate during the minority of either of the *cestuis que trust*, for neither of them, separately, had a vested estate until all attained the age of 21 years, or those within that age had died without lawful issue. And all together were not vested with the entire estate and in a condition to alien until the event before mentioned had happened ; because, upon the death of either under 21 leaving lawful issue, and before she became entitled to be paid in full, such issue would take under the limitations to which I have just referred. It is impossible, I think, in the face of these provisions, to doubt that the trust created by the 10th clause of the will is of the entire estate, and not a trust of each of its three separate parts ; for although the shares of the children are spoken of and referred to in various parts of the clause, such expressions evidently mean the shares to which the children may be entitled upon the happening of the event which vests the estate. "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the time of the creation of the estate," except in the single instance referred to in the 16th section of the act, in regard to the nature and qualities of estates and the alienation thereof. If the limitation be such that by possibility it may create a suspension beyond the time mentioned in the 15th section, it is void ; for the limitation must be such that it must take effect within the prescribed period, or it is void. When an executory devise is limited as an event which may not happen within the period above mentioned, as upon a general failure of heirs or issue, it is void ; nor is it material in such case how the fact actually turns out ; for the possibility, at the creation of such executory limitation, that the event upon which its existence depends may exceed in point of time the limits allowed by law, vitiates it *ab initio*. (*Cruise, title Devise, ch. 17, § 22.*)

The power of alienation can be suspended in no other way than that recognized in the 15th section of the act. It "cannot be suspended for a moderate terms of years, for an

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average duration of lives, whilst certain specified minorities continue, or by any other limitation that may possibly extend such suspension beyond two specified lives in being." By the 10th clause of the present will, the trust was to continue until the three minor children attained their majorities. If two should die before all attained their majority, then the estate, having been held for two lives, its further continuance during the residue of the other minority extends it beyond two lives, and the whole limitation is void. This is the reason given for the judgment of the late court of errors upon a similar question in *Hawley v. James*, (16 *Wend.* 61,) and I think it applies with like force to the limitation of the 10th clause of the present will.

It was thought by the counsel for the appellants that the direction to the executors in their discretion to make advances to Rosine and Margaret, in anticipation of, and on account of, their respective shares, and to all the children for marriage portions, was evidence of an intention to vest the estate in separate shares in each of the children. It is to be observed that the advances to Rosine and Margaret are only to be made after they have respectively attained the age of 21 years, and the other advances are to be made in the event of marriage, before they become entitled to their shares of the fund. The advances are to be made, not out of the shares of the persons to whom they are made, but from the fund generally, in anticipation and as a part of the share. At most, it is but a power in a certain event, and for a short period, and to the extent of a small amount, to anticipate the time of the vesting and distribution of the property. It cannot affect the principal question, or remove the objectionable character of the trust.

I think the judgment of the special term should be affirmed.

Judgment affirmed.

GOCK and JOHN vs. KENEDA and another.

Where two tenants in common of chattels unite in an action for the conversion thereof, one cannot release, discharge or settle the action, so as to defeat the rights of the other to proceed and recover his portion of the damages.

If one of the plaintiffs settles the action, without the consent of the other, and executes a release to that effect, *it seems* the action may proceed in the name of both plaintiffs, for the benefit of the one not releasing; or an amendment can be made, striking out the name of the other.

MOTION by the plaintiffs for a new trial, upon exceptions. The facts are sufficiently stated in the opinion.

Wm. Woodbury, for the plaintiffs.

C. C. Torrance, for the defendants.

By the Court, MARVIN, J. The parties are Indians, residing on the Cattaraugus reservation. The plaintiffs were tenants in common of two pairs of steers, of the value of \$170, and the defendants converted them to their own use, and this action was brought to recover damages for such conversion. The action had been pending some time, when the defendants settled it with Abraham John, one of the plaintiffs, for the sum of two dollars, John executing a paper to that effect, intending however not to release Gock's share of the cattle, but intending to settle the action. The judge at the circuit held that the suit was settled, and directed a verdict for the defendants. The plaintiffs' counsel insisted that Gock could recover for one half the value of the steers, and excepted to the decision.

The rule undoubtedly is that tenants in common must join in an action for the conversion of their property. If they do not join, and the defendant does not object by plea or answer, he cannot upon the trial defeat a recovery. The damages will be apportioned, and the plaintiff will recover for his interest in the property. And when the other tenant sues to recover damages for his interest, the defendant cannot raise the objec-

tion of the non-joinder of his co-tenant. (1 *Chit. Plead.* 66. 7 *T. R.* 279. 5 *Hill*, 59, *note.*) Having joined in the action, can one of the tenants in common settle the action, so as to deprive his co-tenant of the right to proceed and recover for his interest in the property? Counsel stated upon the argument that no such case had been found; and I have found none.

In *Austin v. Hall*, (13 *John.* 286,) the action was by tenants in common, for trespass upon their lands. The defendant pleaded a release by one of the plaintiffs, and the court held that the action was strictly a personal action, and that the plaintiffs were bound to join in it, and that the release was a bar to the action. No authority is cited. This case is noticed in *Decker v. Livingston*, (15 *John.* 482,) and the court say, "There can be no doubt that when there is such a unity of interest as to require a joinder of all the parties interested in a matter of a personal nature, the release of one is as effectual as the release of all." Chitty says, "In personal actions, as in trespass or nuisance to their lands, tenants in common may join, because in these actions, though their interests are several, yet the *damages survive* to all, and it would be unreasonable, when the damage is thus *entire*, to bring several actions for a single trespass." (1 *Ch. Pl.* 65.) In *Co. Litt.* 198 *a*, it is said that when damages are to be recovered for a wrong done to tenants in common or parceners, in personal actions, and one of them dies, the survivor of them shall have the action, for albeit the property or estate be several between them, yet the personal action is joint. After referring to a variety of cases, including trespass upon the lands of tenants in common, in which all must join in the action, and in case of the death of one, the action survived to the other, he says, "But if two tenants in common be of goods, as of one horse or of any other personal, then, if one die, his executors shall be tenants in common with the survivor." We have here the reason why tenants in common must unite to recover damages for a trespass upon their lands. The *right* to the damages—a mere *chose in action*—survives. In the case of personal property

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the survivor of two tenants in common will not be the owner of the entire property, but the personal representative of the deceased will be tenant in common with him. The reason of the decision in *Austin v. Hall*, (*supra*,) does not apply to tenants in common of personal property. It may be argued that as tenants in common must unite in an action for the conversion of their property, or the defendant may defeat the action by taking the objection in his pleadings, the release by one of the plaintiffs will of necessity defeat any action, as his release will estop him. Let us advert to some principles well settled, relating to tenants in common of personal property. One tenant in common has no authority to dispose of the property, so as to divest the title of his co-tenant. If he cannot sell the property and make a good title to the vendee, what authority can he have to release to a wrongdoer the cause of action which belongs to the tenants in common, and which would not survive to him alone? What right has he to settle the action and thus deprive his co-tenant of any remedy? If he settle the action and gives a release, for a valuable consideration, this would be equivalent to a sale of the property, and he has no power to sell his co-tenant's share.

It may be said that a co-tenant may defeat the action by refusing to become a party to it. I apprehend that this is not so. If he should refuse to unite in the action, the law would, I think, afford redress to the other co-tenant. I will not stop to inquire in what manner this could have been done prior to the code. Now, if the consent of any one, who should join in the action, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. (*Code*, § 119.) In the present case the plaintiffs had united in the action; and in my opinion one of them could not release, discharge or settle the action, so as to defeat the right of the other to proceed and recover his portion of the damages. He could settle for his portion of damages, but he could no more settle for the portion of his co-tenant than he could sell the share of his co-tenant. If one tenant in common should settle

for his portion of the damages before action, the other may sue without joining him, and the defendant cannot plead in abatement. (*Baker v. Jewell*, 6 *Mass. R.* 460.) And when one is liable to two or more on a joint contract and settles with one, for his part of the claim, the others may sue for their part without joining the one settled with. (*Holland v. Wild*, 4 *Greenl.* 255. 2 *Mass. Rep.* 405.)

A settlement of the action by one tenant in common, without the consent of the other, will only enure as a settlement of the damages belonging to the party settling.

If the trespasser may settle with one of the tenants in common, before action, for his damages, without affecting the right of the other co-tenants to sue, I can see no reason why they may not settle with one of the tenants, after the action is brought, without affecting the right of the other co-tenants to proceed in the action; and as a tenant in common has no right to sell the entire property, he has, in my opinion, no right to release the entire cause of action. It does not belong to that class of cases where one of the joint obligees, promisees or covenantees may accept performance and give an acquittance.

I see no objection to the action proceeding in the name of both the plaintiffs, for the benefit of Gock; or if that is objectionable, then an amendment can be made by striking out the name of John.

There must be a new trial, costs to abide the event.

[ERIE GENERAL TERM, February 14, 1859. *Grover, Greene, Marvin and Davis*, Justices.]

NANCY BURRITT *vs.* A. H. BURRITT.

As a general rule, as between the father and mother, the obligation to support a child rests primarily upon the father; but this rule is modified more or less by the peculiar circumstances of each case.

In case of a separation or divorce, while the obligation continues to rest as a general rule, and independent of special circumstances, upon the husband, it is materially affected by the facts of each particular case, and may be regulated by the terms of the decree, if there be a judicial separation or divorce.

The award of the care and custody of the child to the mother must be presumed to carry with it the obligation to support, in the absence of evidence to the contrary; or at least to relieve the father from the obligation to furnish such support upon the call of the mother.

At all events he is not so liable without a previous demand and refusal, or an abandonment of the child; which must be regarded as equivalent to a demand and refusal.

The mere omission of the father to support, or the mother's support of the child in the absence and during the non-residence of the father, is not such a refusal to support as obliges the father to refund the expenses incurred by the mother.

To make the father thus liable in a case where a divorce has been decreed, and the care and custody of the child are awarded to the mother, and alimony is given to the wife, there must be special circumstances averred in the complaint, or appearing in the evidence, from which the obligation must arise, or may be reasonably inferred.

APPEAL from a judgment for the defendant, ordered by Mr. Justice GOULD, in a cause tried before him without a jury, at the Rensselaer circuit in October, 1858. The action, as stated in the complaint, was brought to recover of the defendant the sum of \$3900 and interest, for the support and maintenance of Julia Burritt, an infant daughter of the defendant, for several years; the allegation being that the defendant had placed the said Julia in the family of the plaintiff; and that the defendant had wholly abandoned her, and neglected to provide for her, and that said Julia had no estate or property of her own. There was no averment that the plaintiff was the mother of the child, or was or had been the wife of the defendant.

The answer alleged that the plaintiff and defendant had

formerly intermarried ; that the said Julia was their daughter ; that in 1842 or 1843, while the parties resided in Illinois, the plaintiff instituted an action in the court of chancery in that state, seeking a divorce from the defendant, the custody of the daughter, and alimony out of the husband's estate ; that in 1843 a decree was made in said suit, dissolving the marriage, decreeing a divorce, awarding the care and custody of the infant daughter during her minority to the plaintiff, and directing the payment to the plaintiff by the defendant of the annual sum of \$50, as alimony for the term of six successive years. The defendant further alleged the payment of the alimony ; the performance by him of all the other provisions of the decree ; that he had not lived or cohabited with the plaintiff since the decree ; nor had the care, custody, services, society or direction of the said Julia since that time ; but that the plaintiff had had the same, claiming the said Julia under said decree, and not permitting her to reside with the defendant. The other allegations of the complaint were denied. On the trial, with the exception of an admission hereafter noticed, no evidence was given of the marriage, of the paternity of the child, of the refusal of the defendant to provide for her, or of any demand on him to do so ; but it was proved that the plaintiff was the mother of the child, and had exclusively provided for her, and that the child had no property, and that the defendant had not resided with the plaintiff. Evidence was also given of the value or expense of such board and maintenance during the several years that the plaintiff maintained and supported the infant, showing an expense of several hundred dollars. After this testimony was introduced, the case proceeds to say, "Plaintiff admitted that the decree of divorce was as stated in the answer." The defendant's counsel insisted that there was no evidence of divorce in the case, and protested against the admission, and claimed that as the answer had not been put in evidence, its statements relating to the divorce could not be taken as evidence. The testimony was here closed, and the case submitted. The

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judge found as facts in the case, the intermarriage of the parties, the birth of their child Julia, the dissolution of the marriage, the then residence of the parties in Illinois, the absence of the defendant from the plaintiff and the child since 1840, the support of the child by the mother since that time, and the residence of the child with her; that the defendant has not had the control, services or society of the child since that time, but that the plaintiff has had and enjoyed the same, having also for the most part sustained the burthen of her entire support and education, being herself, as was also the child, without property, and having had no assistance in supporting the child, except the sum of two hundred dollars contributed by the grandmother of the child. And he found, as conclusions of law, that the defendant was not liable to the plaintiff for any portion of the support and maintenance thus furnished to Julia Ann Burritt, nor to contribute thereto, even if the pleadings were amended so as to cover the case. The plaintiff excepted, and appealed to the general term.

M. I. Townsend, for the plaintiff.

W. A. Beach and *Clarence Buel*, for the defendant

By the Court, HOGEBOM, J. It is not necessary to discuss the question whether the evidence in the case justified the finding of the judge on the facts. Neither party has excepted to such finding, or sought to review it; and we must therefore assume the facts to be as declared by the court below.

It will be observed that the defendant has not been requested, nor has he refused, to furnish the maintenance and support for which compensation is sought in this action; nor is there any evidence that he has abandoned the child, or refused to furnish her a competent support. It further appears that in point of fact he has not had the possession or the care and custody or control of the child, nor has he had the benefit and enjoyment of her services or society. Under such cir-

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cumstances the question arises, in the peculiar relation and attitude of the parties disclosed by the evidence, is he liable in this action ?

As a general proposition, and during the continuance of the marital relation, it must be conceded that the husband is liable for the support of the child ; but connected with this is the correlative right to the care, custody, control, services and society of his offspring. (2 *Kent's Com.* 206, 207, and notes. *Finch v. Finch*, 22 *Conn. Rep.* 411. *Sargent v. Denniston*, 5 *Cow.* 106. *Hewit v. Prime*, 21 *Wend.* 79.) This right is not absolute and despotic, but is more or less affected by circumstances, and more or less under the control of the courts. When the bonds of matrimony are dissolved, new questions arise, and new rights attach. As a general proposition the father would still have the right to the care and custody of the children, and probably would be liable for their support and education. In the case of an actual separation of husband and wife, either with or without the sanction of the courts, this right has frequently been judicially declared, (*People v. ———*, 19 *Wendell*, 16 ; *People v. Mercein*, 3 *Hill*, 399 ;) and upon general principles, I think, it would ordinarily attach as a legal consequence to the dissolution of the marriage contract. It is doubtless in such case subject to the regulation of the courts, the leading inquiry being, what will contribute most to the welfare of the child ? (*Cook v. Cook*, 1 *Barb. Ch. R.* 644.) The adjudicated cases show that the right of either parent to the custody and control of the offspring is a qualified and not an absolute right, and is to be enjoyed and enforced with primary reference to the well-being of the child. I suppose also the obligation to support the child, as between the father and mother, does not always and exclusively rest upon the male parent. Like the right to the services and society of the child, it is somewhat dependent upon circumstances ; and, among these circumstances, the *ability* of the parent to furnish the support is a proper subject of consideration. (2 *Kent's Com.* 192. *Finch v. Finch*, 22

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Conn. Rep. 411.) As a question between the public and the parents, both are liable. (1 *R. S.* 614.) As a question between the child and the parents, I apprehend the courts may compel either, or both, to contribute. When the question arises between the parents themselves, the primary obligation, in the absence of special circumstances, rests on the father. But this obligation, as a general thing, is connected with, if not dependent upon, the right to control the person, to enjoy the society, and to have the benefit of the services of the child. And this obligation, if not abused to the injury of the child, may in general be exercised in the way most consonant with the views, the convenience or the comfort of the father. Therefore the wife may not in general interfere with the manner in which the husband discharges this obligation. She may not herself furnish the support without consulting him; she may not designate the place, the time or the manner in which that support shall be furnished. Hence, even where the husband is bound to furnish the support, there must be an abandonment of the child on the part of the father, or a failure or refusal to furnish the support on demand or request to that effect, or some other substantial omission of duty on the part of the father to the prejudice of the child, before the mother can step in and subject him to an action at her suit. These are ordinarily conditions precedent to his liability, (*Finch v. Finch*, 22 *Conn. Rep.* 411; *Rolf v. Abbott*, 25 *Eng. Com. L. R.* 400; *Raymond v. Loyl*, 10 *Barb.* 483; *Chilcott v. Trimble*, 13 *id.* 502;) and I think they attach as well to cases where the matrimonial relation has been terminated, as to cases where it continues to exist. Perhaps the reason of the rule is even stronger in the former case, on account of a contrary practice furnishing stronger temptations to abuse. Therefore, in the present case, I find great difficulty in overcoming this objection to the plaintiff's action, that no sufficient evidence appears in the case showing an abandonment of the child by the father, a refusal to supply the necessary support, or a request or demand to that effect. It is a formal

or technical objection, but a substantial one, essential to guard the parental rights and pecuniary obligations of the father.

There seems to me another difficulty. The bill in the divorce suit must be deemed to have been filed as well to obtain the custody and control of the child, as to dissolve the marriage relation. The decree awards it, and as we must presume, in accordance with a prayer in the bill to that effect. It was a proper prayer—proper in this state—and so, we must presume, in Illinois. It would be proper also in this state (and presumptively in Illinois) to connect with such an allegation or prayer, a prayer that the husband should, after the dissolution of the marriage relation, be compelled to furnish or contribute to the support of the child. (2 R. S. 148.) It may be doubted whether the bill having prayed for the custody of the child, an omission to ask that the defendant contribute to its subsequent support, would not be an estoppel upon the plaintiff. Be that as it may, I am inclined to think that the omission to ask in the bill, or to obtain in the decree, a provision requiring the husband to contribute to the support of the child, must *prima facie* be regarded as tantamount to an admission by the plaintiff that no such relief was requisite or called for by the circumstances of the case, and that the plaintiff would willingly encounter the burthen of the support in consideration of the benefit and enjoyment of the services and society of the child. At least I think that should be the presumption, until the mother in a direct proceeding for that purpose, either in continuation of the proceedings in the divorce suit, or founded upon those proceedings, should bring the matter to the notice of the court. I do not say that she should be restricted to the tribunal originally entertaining the proceedings for a divorce, but that she should institute a suit or proceeding setting forth what had been previously done, and the peculiar reasons which entitle her to invoke the aid of the court. The presumption is against her, from her omission to seek this relief originally in a proceeding in which it

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was perfectly competent to be granted, and she must remove that presumption by direct and affirmative allegations, as nothing of this kind appears in the pleadings or in the evidence in the present action. I do not think the plaintiff has made a case justifying the interference of this court.

Again : The obligation to furnish support to the child does not arise wholly from the parental relation ; for, in such case, it would rest equally on either parent. Nor does it depend wholly upon the pecuniary ability or capacity for labor of the parent ; for then it would often rest upon the mother. Nor does it depend entirely upon the fact that the law recognizes the husband and father as the head and supreme power of the family ; for then it would always rest upon the male parent. But it is an obligation growing partly out of all these relations and many others ; and prominent among them is the right to the care and custody, the society and services of the child. The duty of the father to support the child arises in part from the right to control the person and to command the services of the child. The power to command must involve the obligation to obey. At least I think all these things proper to be considered in connection with, and as entering more or less as, elements of this imperfect obligation which rests upon the father to support the child. When these inducements and benefits are, as in this case, withdrawn, the weight of the obligation is also sensibly diminished. It would seem almost an oppressive exercise of power, first to withdraw the child wholly from the care, control and influence of the father ; to deprive him entirely of its presence, society and aid ; to put it entirely in the possession and control of the mother with whom he is at variance ; to allow that mother to support, educate and maintain it in her own way and agreeably to her own pleasure ; and then to require from the husband an absolute and unquestioning compliance with all her demands for the means of its support, education and maintenance. There may be cases where this is proper, but the circumstances must be peculiar, and I think it does not neces-

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sarily or reasonably follow from the facts which appear before us in the present case.

On the whole, therefore, my conclusions are, 1. That as a general rule the obligation to support the child rests primarily upon the father, but that even this is governed more or less by the peculiar circumstances of each case. 2. That in the case of a separation or divorce, while the obligation continues to rest, as a general rule and independent of special circumstances, upon the husband, it is materially affected by the facts of each particular case, and may be, and usually is, and properly should be, regulated by the terms of the decree, if there be a judicial separation or divorce. 3. That the award of the care and custody of the child to the mother must be presumed to carry with it the obligation to support, in the absence of evidence to the contrary; or at least, to relieve the father from the obligation to furnish such support upon the call of the mother. 4. At all events, that he is not so liable without a previous demand and refusal, or an abandonment of the child, which must be regarded as equivalent to a demand and refusal. 5. That mere omission to support, on the part of the father, or the mother's support of the child in the absence and during the non-residence of the father, is not such a refusal to support as obliges the father to respond for the expenses incurred by the mother. 6. That to make the father thus liable in a case where a divorce has been decreed and the care and custody of the child are awarded to the mother and alimony to the wife, there must be special circumstances averred in the complaint or appearing in the evidence, from which the obligation must arise, or may be reasonably inferred.

The judgment of the court below should be affirmed.

[ALBANY GENERAL TERM, March 7, 1859. *Harris, Gould and Hogeboom, Justices.*]

SMITH, adm'r of Ward, vs. THE NEW YORK CENTRAL
RAIL ROAD COMPANY.

A carrier of passengers may, by positive stipulation, relieve himself, to a limited extent, from the consequences of his own negligence or that of his servants. But to accomplish that object the contract must be clear and explicit in its terms, and plainly covering such a case.

W. made a contract with the defendant to transport a lot of cattle upon its rail road, and was traveling with them, under what was called a "drover's pass," which contained a provision that "the persons riding free to take charge of the stock, do so at their own risk of personal injury from whatever cause." *Held* that this stipulation in the contract did not exempt the carrier from liability for gross negligence, or for the want of ordinary care. That the carrier was liable for what—independent of any peculiar responsibility attached to its calling or employment—would be regarded as fault or misconduct on its part; and was bound to observe reasonable care and precaution, employ persons of requisite skill, and possess vehicles fit for use and adapted to the nature of the service required.

And an action being brought by the administrator of W., against the carrier, for negligence in causing the death of W. by using a flattened wheel, which caused the car to bound and jolt, and finally threw it off the track, it was *further held* that it was not erroneous to charge the jury that it was the duty of the defendant to provide competent and careful men, safe vehicles, and a properly constructed track, so far as ordinary care and diligence would enable them to do so; and that if the jury should find that the injury was caused by the insufficiency of the car by means of a defective wheel—the defendant's employees having been warned of the condition of the running apparatus of the car and its danger—they would be justified in considering the use of such a car in the transportation of passengers a reckless exposure of life, amounting to gross negligence, entitling the plaintiff to recover.

THIS is a bill of exceptions ordered to be heard in the first instance at the general term. The action was brought to recover damages for alleged negligence on the part of the defendants in causing the death of Joseph Ward, the plaintiff's intestate, on the 24th day of March, 1855, and was tried before Mr. Justice EMOTT, at the Albany circuit, in March, 1856, when the plaintiff recovered a verdict for \$5000. The alleged negligence consisted in the use of a flattened wheel, which caused the car to bound and jolt, and finally threw it off the track, when the plaintiff's intestate, following the example of the brakeman and others, jumped from the car and received

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injuries, which resulted in his death in an hour afterwards. The defense was that the car was not a dangerous one, and that the accident resulted from a broken rail, against which no prudence or precaution could guard, and that the negligence of Ward contributed to the injury; also that Ward was traveling under a free pass, and under a contract by which he agreed to take upon himself the risk of personal injury. There was evidence on both sides, tending to sustain either theory; to wit, that the accident was caused by the employment of an unfit and not road-worthy car, of the danger of using which the conductor and employees were seasonably warned, before the occurrence of the casualty; and on the other hand, that it was occasioned by a broken rail which had been examined shortly previous, and no imperfection discovered therein. The plaintiff's intestate was transporting a lot of stock on the rail road, and was traveling under what was called a drover's pass, which provided that the holder "takes all the responsibility as to the injury of himself or stock," and had also entered into a written contract with the defendants which recited the price at which the stock were to be transported, (alleged therein to be reduced rates in consequence of the owner assuming certain risks,) and provided that the intestate should assume certain risks arising from the temper and conduct of the stock, their detention on the road, from their being crowded or injured in consequence of the burning of their feed, and also from insecurity in the floor, frame or doors of the cars; and that said Ward should load, unload and tranship them at his own risk. The contract also contained this clause: "And it is further agreed between the parties hereto, that the persons riding free, to take charge of the stock, do so at their own risk of personal injury from whatever cause." The judge refused to nonsuit the plaintiff, and charged the jury, among other things, that there were two questions in the case: 1st. Whether the death of Mr. Ward was the result of *culpable* negligence of the defendants or their agents; 2d. Whether his own negligence contributed to the result. He further charged that it was not

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strictly accurate to say that Ward was traveling under a free pass, but that the sum paid was manifestly intended as a compensation for his passage, as well as the transportation of his stock. That if he had been on the car under a free pass, this fact would not have absolved the defendants from liability for injuries caused by their culpable negligence; and that the agreement did not relieve them from responsibility for injuries occasioned by their own gross negligence. That the fair construction of the agreement was that Ward assumed the risk—from whatever cause—of such personal injuries as were not occasioned by wrongful and culpable negligence on the part of the defendants and their agents; that if the meaning of the agreement was that no action would lie against the defendants for any negligence or imprudence, it was void as against public policy. That the plaintiff being lawfully in the cars, the defendants were not relieved from responsibility for the injury, if it resulted from their *culpable neglect* to exercise those precautions which *ordinary care* demanded from them in the business of carrying passengers. That if the flattened wheel caused the car to leave the track, then it was *great negligence* to use it, especially after its danger had been pointed out, as was proved to have been the case. That either the defendants did all that prudence, skill and foresight could do, *or they were grossly negligent*. That the jury must find for the plaintiff if the death of the intestate was caused by *gross negligence* on the part of the defendants, without fault on his part; otherwise they must find for the defendants. That if the jury should find that the injury was caused by the insufficiency of the car—that a car with a flattened wheel like this might be expected to leave the track when in rapid motion—and that the condition of the wheel produced this result, the defendants' employees having been warned of the condition of the running apparatus of the car and its danger, they would probably have little difficulty in finding that the use of such a car in the transportation of passengers was a reckless exposure of life, amounting to gross negligence. That it was the

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duty of the defendants to provide competent and careful men, safe and roadworthy vehicles, and a properly constructed track, so far as *ordinary care and diligence* would enable them to do so, and the agreement proved could not relieve them from this duty ; and if they failed to do this in any respect in the present instance, the jury would find the *first* issue (whether Ward's death was the result of culpable negligence of the defendants or their agents) in favor of the plaintiff. To every part of this charge, separately and severally, the defendants (as the case states) duly and seasonably excepted. The defendants moved for a nonsuit, upon the ground that the special agreement limited the liability of the defendants, and that the accident was within the risk voluntarily assumed by the plaintiff; and also that under said agreement the defendants were only liable for willful misconduct, of which there was no evidence. The court denied the motion, and the defendants excepted. The defendants' counsel requested the court to charge the jury that the special agreement was a legal and binding contract between the parties, and furnished the rule by which, alone, the rights of the parties to this action were to be determined. The court declined to charge in the terms of the request, and the defendants' counsel excepted. The defendants' counsel also asked the court to charge that under said agreement the defendants were only liable for willful misconduct, of which there was no evidence. The court declined so to charge, and the defendants' counsel duly excepted.

John H. Reynolds, for the defendants.

John K. Porter, for the plaintiff.

By the Court, HOGBOOM, J. By the principles of the common law the responsibility of common carriers was very severe. They were liable for all losses, except those occurring by the act of God, or the enemies of the country. Possessing in some respects a public character or employment, they were held incapable, so long as they acted in that capacity, of divesting themselves of their common law responsibilities. After a time the rule was to some extent relaxed, and they were allowed by public notice brought home to their customers, to lessen, in some respects, the degree of their responsibility. But this was

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for a long time a vexed question in the courts, and has never obtained in this state. The law is well settled to the contrary of such a right. (19 *Wend.* 234, 251. 1 *Kern.* 490.)

Nevertheless it was felt that the rule, in many cases, operated harshly, and was not altogether adapted to the demands of an expanded commerce. Common carriers finding themselves foiled by the courts in attempting to restrict their liability by a public notice, resorted to another expedient—that of making a *special contract* with the owner or shipper of the goods for a diminished risk. The right to do this was for a time disputed, but it gradually obtained a foothold in the courts, and may be now regarded as firmly established. (1 *Kern.* 490. 14 *Barb.* 524. 13 *id.* 353.)

But even this right has been held, on principles of public policy, not to be without qualification. A carrier of goods cannot stipulate for absolute exemption from all liability. He cannot covenant against his own fraud or willful misconduct. (4 *Seld.* 375. 13 *Barb.* 360.) And it is said, in some cases, that he cannot covenant against his own *gross* negligence. (13 *Barb.* 360. 7 *Hill*, 533.) The principle is, that undertaking to carry, he must do all that common prudence requires to carry safely. He undertakes a task, and he must perform it. He is not to be permitted to lay aside that degree of care and precaution which good faith and a proper sense of the importance of his trust, and the value of the property committed to his charge, require at his hands. (4 *Seld.* 375.)

And yet it is possible that as respects the carriage of goods, where no principle of public policy is violated, and where it may be rationally supposed that a keen sense of self interest will protect parties from improvident contracts, a common carrier may be regarded as authorized to make any special agreement he can fairly succeed in making with his customer, for a qualified risk, always excepting agreements for indemnity against his own fraud or willful misconduct.

A somewhat different rule obtains in regard to carriers of human beings. They are not in the strict sense, perhaps not in any just sense, of the term denominated common carriers. (15 *N. Y. Rep.* 446. *Story on Bailm.* § 498.)

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The common law imposes upon the carriers of passengers the duty of transporting them with the highest degree of care and precaution. They are not, as common carriers are, absolute insurers (within the limitation above mentioned) for the safe delivery of their passengers at the point of their destination; but they are bound to exercise the utmost care and the most rigid precaution. (1 *Duer*, 233. 16 *Barb.* 353.)

Very slight negligence will make them liable to an action. They are charged with the care of human life, and it is right that they should be held to a most rigid responsibility. Nevertheless it is quite certain, under the modern decisions, that as in the case of carriage of goods, this responsibility may be restricted; not by a public notice posted or published; not by a notice brought home to the knowledge of the passenger himself, for that is still regarded as only the act of one party; but by a special agreement. (6 *How. U. S. R.* 344. 26 *Barb.* 641.) It seems to be settled, in deference to the great principle of allowing parties to make their own contracts, where no rule of public policy or of positive law is violated, that parties may contract for a less burdensome obligation upon the carrier of passengers than is imposed by the principles of the common law. (26 *Barb.* 641. 1 *Kern.* 490. 14 *Barb.* 524.)

It does not seem to be expressly settled how far this restriction may be carried. It is generally conceded that it cannot be carried to the extent of relieving the carrier against the consequences of his own fraud or willful misconduct. (*Cases before cited.*) And I do not think it ought to be permitted to relieve him against the fraud or misconduct of his servants or employees. It has been suggested by an eminent judge, that it might be permitted to cover this latter ground. (*Per Gardiner, J., in Wells v. St'm Nav. Co., 4 Seld.* 381.) But I think the argument unsound. It would be trifling with human life. Principles of public policy—a proper regard for the safety of the subject and the citizen—in my opinion, forbid the application of such a rule, or the concession of such a power. Perhaps, also, a party should not be allowed to bargain for absolving a carrier of passengers from gross negligence; and by that, in this connexion, I mean a degree of negligence which

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amounts to fraud or criminality, and implies a reckless disregard of human life, and the absence of proper moral sentiments.

Making these exceptions, I am not prepared to say that parties may not, if they do it understandingly, stipulate to relieve the carrier to any extent upon which they may deliberately agree, from the common law obligations of his contract, and from any degree of negligence to which the passenger, with a full consciousness of his rights, may consent.

We come now to the consideration of the contract itself, its nature and effect. Having ascertained what the parties might lawfully do, let us see what in point of fact they did do. I think the judge at the circuit was right in saying that Ward was not, in the strict sense of the term, a *gratuitous* passenger. If the compensation paid was professedly for the transportation of the stock, it involved the condition that a person was to be permitted to ride along to take care of them. This was indispensable, and a convenience to both parties. It was a part of the contract. The agreement was, that the "persons riding free, to take charge of the stock, do so at their own risk of personal injury, from whatever cause." This language, it must be confessed, is very broad and comprehensive, and yet, by the argument of the defendants' counsel, it is conceded that it has limitations. It is admitted that it does not cover injuries arising from the fraud or the willful misconduct of the defendants. But this, it will be said, is a limitation imposed *by law*, and not by the agreement of the parties. I think it is *by both*; for the law will neither suffer it to be done, nor presume that the parties intended it. We must put ourselves in the place of the parties, and see what they really intended. Was this clause designed to cover any risk arising from the misconduct of the carrier, either from his *willfulness* or his *negligence*? Negligence is the omission of care. Did the parties mean to say that if the carrier omitted the ordinary precautions which a man observes in taking care of himself or of his own property, he should be exempt from liability? Did the parties contemplate a license to be guilty of negligence? If such a clause had been expressly incorporated into the contract, so that the passenger might have read it, would he have signed it? There are risks incident to the

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transaction, to which this clause might naturally and properly apply; risks from the stock themselves; risks from detentions along the way; risks from the necessity of moving about the cars for the purpose of feeding and taking care of the stock; risks from the increased difficulties and perils of operating a train of cars heavily incumbered with live stock; risks incident to the management of every rail road train, and inherent in the very nature of the business, and not always possible to be avoided, even by the exercise of the utmost precaution. Against such risks we may well conclude the parties intended to contract; but to assume that the passenger intended to issue a license for misconduct, or pay a premium for negligence, is more than I am willing to believe.

We are not without authority on this point. In the case of the *N. J. Steam Nav. Co. v. The Merchants' Bank*, (6 How. U. S. R. 383,) which was an action against a common carrier for the loss of goods by fire, the clause on which the carrier relied for exemption was, "at the risk of the master and owners." The court say, "The language is general and comprehensive, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intention of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for *willful* misconduct, *gross* negligence or want of *ordinary* care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands."

A similar conclusion was arrived at, where the question arose upon the liability of the carrier for the loss of live stock by an accident upon a rail road, in the case of *Sager v. The Portsmouth Rail Road Co.*, 1 *Amer. Railway Cases*, 172.) In that case the language of the contract was, "We take upon ourselves the risk of all and any damages that may happen to our horses, cattle, &c., and that we will not call upon said rail road company, or any of their agents, for *any damages whatsoever*."

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In the case of *Alexander v. Greene*, (7 Hill, 533,) the question arose upon a contract for towing a canal boat, and the language of the contract was, "Capt. H., of steamboat N., take in tow for Albany canal boat A. &c., *at the risk of the master and owners thereof*, and collect \$30." The canal boat being lost by being run upon a rock, and her cargo lost, the supreme court held that the owners of the towing vessel or steamboat were exempted from liability by the broad and unqualified language above quoted. But the court of errors reversed the judgment. Senator Bockee (p. 546) says, "The defendants must be responsible at least for gross negligence." "But I go farther, and am of the opinion, that, notwithstanding the permit, the exigencies of this case require the owners of the steamboat to respond for losses occasioned by the *want of ordinary* skill and care on the part of their agents." "True, as a general rule, the operation of law may be controlled by the agreement of the parties; but this rule is subject to many exceptions and qualifications. If the permit had been intended to exempt the defendants from the consequences of their own negligence, which the law fixes upon them, such intention ought to have been clearly and unequivocally expressed, so as to leave no room for doubt or misconception." Senator Lawrence says, (p. 548,) "Under the most favorable view of the subject, we are bound to hold the defendants responsible for *ordinary care* and skill." Senator Porter says, (p. 560,) "I have no hesitation in saying that the contract will not, in my opinion, admit of a construction that shall protect the defendants from a loss arising from gross negligence." See also further observations by him upon the contract and its proper interpretation, at page 559. This case was followed, under a contract of a precisely similar description, by our court of appeals in *Wells and Tucker v. The Steam Nav. Co.* (4 Seld. 375.) It was there held, in accordance with the charge of the judge at the trial, that the clause in question did not protect the owners of the steamboat from injuries arising from the gross negligence of their servants

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navigating it, although not occasioned by fraud or want of good faith; and that a stipulation in a contract to exempt from gross negligence, must be specific and distinct; and that it will not be implied from a clause containing a general expression which might otherwise be so construed. This was as far as the questions arising in the case required the court to go; but Judge Mason, in pronouncing the opinion of the court, uses language which imports that the defendants would be responsible for any degree of negligence, or for negligence in a general sense, without characterizing it as gross. He says, (*p.* 380,) “And it is certainly much more reasonable to infer that when they declare that the boat shall be towed at the risk of the owners, they intended such risks as were incident to the navigation, where proper care and skill were exercised, rather than risks to which it might be exposed by the *negligence* of the persons in charge of the steamboat.” “As there are risks of the navigation to which the special clause in the permit may naturally be applied, and more consistently with honesty and fair dealing than if extended to the *negligence* of the defendants, it is undoubtedly the duty of the court so to apply it. Such a construction is consonant with the probable intention of the parties.”

In the case of *Moore v. Evans*, (14 *Barb.* 524,) the question arose upon a contract to transport goods from Buffalo to Milwaukie, at the risk of the owner. The circuit judge had held that the defendant could not by special agreement restrict his liability as a carrier, and his decision was reversed. Judge Wright, who delivered the opinion of the court, principally discussed the question whether a carrier might by express contract restrict his common law liability, and I think he successfully maintained and demonstrated the affirmative of that proposition. In remarking upon the effect of the contract, he uses this language, (*p.* 530,) “The goods were to be transported at the risk of the owner. The agreement exempted the defendant from losses arising out of events and accidents against which he was a sort of *insurer*. As he had

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undertaken to carry, however, from Buffalo to Milwaukie, the like degree of responsibility attached to him as to a private person engaged casually in the like occupation. He was answerable for his own *negligence* or misconduct or that of his servants. But the burden of proving that the loss was occasioned by a want of *due care*, or by *gross negligence*, was on the plaintiff." "When the carrier's liability is restricted by special agreement, the onus is shifted upon the employee. If *negligence* or misconduct be alleged, the burden of proof is on the latter."

In some of these cases, it will be observed that the degree of negligence which is held not to be covered or protected by language nearly similar to that in the case at bar, is not accurately defined. For my part, I think not only gross negligence is not protected by the terms of the contract, but what is termed *ordinary* negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is liable for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part. He must, like a person casually or temporarily, or for a single occasion, engaged in the employment in question, observe reasonable care and precaution, employ persons of requisite skill, and possess vehicles fit for use and adapted to the nature of the service required. I do not believe *this* contract exempts him from any such responsibility. He may, I think, by positive stipulation relieve himself, to a limited degree, from the consequences of his own negligence or that of his servants. But to accomplish that object, the contract must, in my opinion, and as is said in several of the cases above cited, be clear and specific in its terms, and plainly covering such a case.

I am aware of the difficulty of defining in terms the difference between slight, ordinary and gross negligence, and of the confusion that sometimes arises in their application. In truth it is impossible, by any general definition, to convey to the

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mind any such distinct and intelligible impressions of the differences between them as shall enable us to apply it as a standard to all cases that may arise, and certainly determine to which class a particular case belongs. But that arises from the imperfection of language, and from the infinite diversity of human conduct and events. It is a question of fact, or rather of mixed law and fact, to be determined by the circumstances of each particular case. Some confusion, too, has arisen, I think, from the want of precision with which the terms are sometimes employed in judicial opinions.

The view here taken of the contract in question does not conflict, I think, with the decision of a co-ordinate branch of this court, in the case of *Welles v. The N. Y. Cent. R. R. Co.*, (26 *Barb.* 641.) The contract (if such it was) in that case was, "That the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket." In that case *negligence* was expressly stipulated for, (if stipulated at all,) and no degrees being mentioned, I think it covered all degrees of *mere* negligence. It was conceded that even under such a contract the defendants were liable for injuries which were the result of fraudulent, willful or *reckless* misconduct. But for this decision, I should have had some doubt within the principle of *Dorr v. The New Jersey Steam Navigation Co.*, (1 *Kern.* 485,) and other adjudged cases, whether the mere acceptance of a passage ticket, with a notice like the one above mentioned indorsed thereon, would amount to such a special contract, signified by the mutual and intelligent assent of both parties, as would alter their ordinary legal relations towards each other. It is enough, however, to say that the facts of that case withdraw it from the operation of the rule established in the case at bar.

It only remains to consider whether the instructions given by the circuit judge to the jury violate the rules of law above laid down for the interpretation of the contract in

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question. And I am unable to see that they do, unless, possibly, in a single particular to which I shall presently refer. The general current and tendency of the judge's charge to the jury was to exempt the defendants from responsibility, unless they had been guilty of gross or culpable neglect. This idea was expressed in considerable variety of phrase, but still, I think, the jury could scarcely have been misled in that particular. It is true he did not define what in all cases amounted to gross or culpable neglect, nor was he called upon, or invited to do so. As before stated, it was not susceptible of precise definition, nor are any of the other numerous terms employed susceptible of that accurate definition which will make a perfectly clear impression on the mind, disconnected from the facts of the case. The terms care, prudence, precaution, negligence, misconduct, are all difficult of precise definition, and can only be defined by nearly synonymous terms; or by a circumlocution of words which may help to illustrate their meaning; or by being considered in connection with the facts of the case. It is adjudged that *gross*, that is very great, marked or excessive negligence will make the carrier liable. Can it be doubted that *culpable*, that is blameworthy, inexcusable or criminal negligence would do so? Perhaps the judge went so far as to say or imply that the want of *ordinary*, usual, customary, generally observed care would, under the terms of this contract, expose the carrier to an action. Some of the cases or opinions above referred to go this length, and I concur in the rule. I cannot think that the parties to this contract contemplated the withdrawal from this at best hazardous and responsible business, of those reasonable and ordinary precautions which men in general would exercise when employed either permanently or temporarily in a similar vocation. In several of the particulars excepted to, the judge merely expressed an opinion upon the effect of the evidence, and that was never a good ground of exception.

In regard to one clause of the charge, I have entertained some doubt. The judge charged, in substance, that the fail-

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ure in *any respect*, by the defendants, to provide competent and careful men, safe and roadworthy vehicles and a properly constructed track, so far as ordinary care and diligence would enable them to do so, required the jury to find that Ward's death was the result of the culpable negligence of the defendants or their agents. Standing alone, this part of the charge would be, I think, untenable, because all this might be true, and the injury nevertheless have resulted from some other cause. And if this was the only part of the charge contained in the case, I should not hesitate to conclude that a new trial ought to be granted for that cause. But various other portions of the charge are found in the case and it is quite apparent from its general scope and tenor that the judge meant to instruct the jury, and did so in other parts of the charge, that the negligence or misconduct must not only exist, but must cause or contribute to the injury. On the whole, I think the jury could not have been misled; and thus understood, I regard the charge as unexceptionable, and am therefore of opinion that a new trial should be denied.

New trial denied.

[ALBANY GENERAL TERM, March 7, 1859. *Wright, Gould and Hogeboom*, Justices.]

 WOOD *vs.* LESTER and others.

A mortgage, given to secure the payment of the purchase money of a farm, provided that the mortgagor should deliver all the wood he might cut upon the mortgaged premises, upon the line of the N. Y. Central rail road, at the place designated by the rail road company; that the mortgagee should have a lien upon such wood, for the purchase money, until the same should be fully paid; and a similar lien upon the crops &c.; that the mortgagee should have the right to demand and receive from the rail road company three dollars for every cord of wood so delivered; and that the mortgagor should from time to time, on the demand of the mortgagee, execute and de-

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liver to him such chattel mortgage or mortgages as might be necessary to perfect and perpetuate the lien, until the purchase money should be fully paid, &c.

Held that this was a valid agreement; and although it could not take effect until the wood should be cut and severed from the freehold, yet it attached instantly, as the wood became personal property; and that it should be enforced against the mortgagor, and all persons claiming from and through him, with notice of the lien thus created. JOHNSON, J. dissented.

Held also, that a creditor of the mortgagor, who had notice of the prospective lien of the mortgagee upon the wood, before his rights attached by virtue of an execution issued upon a judgment subsequently recovered against the mortgagor, was not a bona fide purchaser, but took the wood subject to the prior equitable rights of the mortgagee.

That the agreement for the lien was neither a chattel mortgage nor a sale of chattels, because, at the time it was made, the subject matter of the lien was not in existence as personal property; and therefore was not affected by the statutes concerning sales and mortgages of chattels.

That the provision for executing a chattel mortgage, &c. on request, was, at most, cumulative, and did not at all qualify, or affect the validity of, the lien previously stipulated for.

That in respect to the grass or hay upon the premises, there being no evidence that the subsequent judgment creditor had any notice or knowledge of the mortgagee's lien thereon, before he purchased the same of the mortgagor, he must be deemed a bona fide purchaser thereof, and entitled to hold it, discharged of such lien.

APPEAL from a portion of a judgment entered at a special term. The action was brought to foreclose a mortgage. The complaint states that the defendant Melvin Power, on or about the 1st day of May, 1856, purchased of the plaintiff the premises therein described, for the consideration and price of \$26,568.75. That \$4000 of the purchase money was paid by Power, and on the day of the execution and delivery of the deed of the premises by the plaintiff, Power, in consideration thereof, and in order to secure the residue of the purchase money, with interest, on the day aforesaid executed and delivered to the plaintiff his bond, sealed with his seal, in the penalty of \$45,000, conditioned to pay the plaintiff \$22,568.75, and interest thereon, as follows: \$13,568.75 and interest thereon in nine equal monthly installments, the first to be paid on the 6th day of June (then) next, and the rest on the 6th

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of each succeeding month until the whole was paid; the interest on each installment to be paid therewith, and to be computed from the first day of April (then) last; \$9000 and the interest thereon from the first day of April, to be paid as follows: the interest semi-annually, on the 1st of October and April in each year. \$1000 of the principal to be paid on the first day of May (then) next, and \$8000 on the 1st day of May which would be in the year 1864, with the privilege to said Power to pay \$9000 at any time he might choose so to do sooner than above mentioned: and as collateral security for the payment of the said indebtedness, the said Melvin Power on the same day executed, duly acknowledged and delivered to the plaintiff a certain indenture of mortgage upon the premises sold by the plaintiff to him, being about 350 acres of land in the town of Farmington in the county of Ontario, describing the same particularly; conditioned to pay the sum of money mentioned in the condition of said bond in the manner and at the times therein specified; and the mortgage contained the following covenants in substance, viz: "The said Melvin Power covenanted and agreed with the plaintiff that he, said Power, would deliver, without unreasonable delay, all the wood he might cut from the premises above described, upon the line of the New York Central Rail Road Company, at the place designated by said company, and that he would saw and fit the same for use; that the plaintiff should have a lien upon all the said wood for the purchase money, until the payments in the first condition of said mortgage—the afore-said monthly payments—should be fully paid; that the said plaintiff should have the right to demand and receive from the said rail road company the sum of \$2.75 for each and every cord of wood so cut and delivered, when delivered and measured, and the further sum of 25 cents per cord as fast as the same should be sawed and ready for use; and that the said Melvin Power should, in any and every contract and agreement he might make with the said rail road company for the sale of said wood, provide for the payment to the party of the

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second part, in said mortgage—the plaintiff in this action—of the sum of three dollars per cord for each and every cord of said wood in the proportion aforesaid, until the nine monthly installments were fully paid ; and that the said plaintiff should also have a lien upon all the crops of every kind, upon said premises, and that the said Melvin Power should from time to time, on demand of the said plaintiff, execute and deliver to him such chattel mortgage or mortgages as might be necessary to secure and protect such lien and to perpetuate the same, until said nine monthly installments should have been fully paid, when such lien should cease and be discharged.”

The complaint further alleged that said mortgage was given and the said condition inserted to secure the payment of a part of the purchase money of said premises, which was sold and conveyed by the plaintiff to said Melvin Power by deed bearing even date with said mortgage ; and that said mortgage contained the usual power of sale in case of non-payment. That the mortgaged premises consist of farming land, are occupied as one farm, and are so situated that they cannot be sold in parcels without material injury, &c. ; also that the mortgage was duly recorded on the 5th day of March, 1856. The complaint then alleges that Power has omitted to pay either of the monthly installments that became due on the 6th days of June, July, August, September, October and November, excepting that on the 23d day of July, 1856, there was paid to the plaintiff on the bond and mortgage the sum of \$2211.06, the avails of a quantity of wood cut and taken from the premises ; and on or about the 20th of October the plaintiff received a quantity of corn in the ear, corn stalks and pumpkins, that were raised on said premises, of the value of \$27.22 ; and on the 1st day of November, 1856, the plaintiff received \$310.50 in cash ; and claiming that there was, at the commencement of the action, due the plaintiff on said bond and mortgage, the sum of \$6799.06, and thereafter to become due thereon the further sums following, viz. (stating them and the times when due.) That after the execution of said bond

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and mortgage, and after the mortgage was recorded, the defendant Lester took from the defendants Melvin Power and wife, a bond and a mortgage, covering the same premises, bearing date May 26th, 1856, to secure the payment of the sum of \$60,000, &c. being a precedent debt, &c. On the 7th day of June, 1856, Lester perfected a judgment by confession against Power, for the amount of his bond and mortgage.

After default had been made in some of the payments on the plaintiff's mortgage, Power cut from the farm 600 cords of wood, part of which had been delivered at the rail road station, and the remainder was on the premises where it was cut, but no portion of it had been received or paid for by the company, and on the 7th July, 1856, Lester caused said wood to be levied on by virtue of an execution on said judgment, and claimed it free from any lien of the plaintiff. On the 28th day of June, 1856, Lester purchased of Power about 80 acres, and also an undivided half of about 40 acres of grass growing on said farm, and claimed to hold it under such purchase, free from the plaintiff's lien. The only consideration for the sale of the grass was the application and indorsement by Lester of \$2712 upon Power's bond, held by him. Before Lester took his bond and mortgage, he had actual notice that the plaintiff was to have the avails or proceeds of the wood cut by Power from the farm, to apply on his mortgage. On the 28th day of October, 1856, and after the commencement of this action, the sheriff sold the wood by virtue of said execution, and the defendant Lester purchased the same at such sale.

The cause was tried at the Ontario special term, in February, 1857, before Mr. Justice JOHNSON, when the foregoing facts were proved or admitted, and a judgment of foreclosure and sale was ordered; but it was also adjudged that the title of Lester to the grass, hay and wood was superior to the claim of the plaintiff, and that Lester recover costs out of the proceeds of the sale. From that portion of the judgment which declares Lester's title to the grass, hay and grain superior to that of the plaintiff, the plaintiff appealed.

The following is the opinion of the court delivered at the special term :

JOHNSON, J. "The only question in respect to the plaintiff's rights arises upon his claim to a lien upon the cord wood and crops of Power, which he is seeking to enforce as against the defendant Lester, who claims as creditor and purchaser of Power.

The plaintiff's rights, whatever they may be, spring from the mortgage, which was taken for the express purpose of securing the purchase money, when the premises were sold and conveyed by him to the defendant Power. His lien is what the mortgage gives him, and nothing more ; it was secured by express contract. The mortgage was executed according to the agreement, and has been recorded, and the lien created thereby is a legal lien, and is the only one which the plaintiff has, or can enforce. The doctrine of an equitable lien in favor of the vendor, to secure the purchase price, has no application whatever to such a case. There is nothing left here for equity to imply. The mortgage is for the whole debt, and covers the whole premises, and the judgment and mortgage of the defendant Lester are confessedly subsequent in date and right. The equitable lien attaches where no mortgage is taken upon the land sold and conveyed ; or, where a mortgage is taken for a part of the purchase price only, it may attach to secure the payment of the residue.

It is insisted by the plaintiff's counsel that the mortgage covered the timber standing upon the premises when it was executed and delivered, and that equity would extend the lien, when the timber was severed from the soil, to the wood into which it was converted. However this might be if the severance was wrongful, in the nature of waste, the rule would not apply in a case like this. It is plain from the mortgage that the parties contemplated the conversion of the growing timber into cord wood by the mortgagor, and the plaintiff's right to the wood in that event was agreed upon, and rests in the cov-

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enant in the mortgage. The covenant in substance is, that the plaintiff shall have a lien upon the cord wood cut from the timber to the extent of three dollars per cord, and also upon all the crops of every kind raised upon the farm, and that the mortgagor should, from time to time, on the demand of the plaintiff, execute and deliver to him such chattel mortgages as might be necessary to secure and perpetuate such lien until all the monthly payments should become due. A chattel mortgage upon personal property is a sale to the mortgagee, which vests the title, and it is obvious that this is what the parties looked to for the plaintiff's security. The covenant, therefore, is a mere agreement for the sale of the personal property by way of mortgage, as additional security, at a future day, at the request of the plaintiff. It cannot operate as a personal mortgage, of itself, because it is apparent that the parties did not so intend it, inasmuch as the agreement is to give a chattel mortgage in future; and if it could be construed into a chattel mortgage, it would be void as against the creditors of the mortgagor, having never been filed in the office of the town clerk, and also as a mortgage upon personal property, not then *in esse*. The plaintiff has failed to secure his lien or title to the wood, for aught that appears, by his own laches; and the defendant Lester having perfected a judgment and secured a levy, has acquired a right superior to any which the plaintiff may have, as against Power, under his covenant in the mortgage. This disposes of the plaintiff's claim to the cord wood, levied upon under the defendant Lester's execution. As to the hay or grass conveyed by Power to Lester, there is no principle, that I am aware of, which would take that from the purchaser, and give it to the mortgagee of the real estate. As before remarked, he has acquired no title by his covenant in the mortgage, and it can scarcely be pretended that the equitable lien, even if it existed in favor of the vendor in such a case, would extend to emblements, or to the annual products of the soil, such as fruits, grass and the like, which could be taken without the commission of waste.

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But if I am wrong in all this, and the equitable lien subsists in such a case, and extends to the annual products of the soil, which constitute in good part the rents and profits, the plaintiff would fail as to the grass or hay, because that was conveyed in satisfaction of a precedent debt, and without any notice to the purchaser of the plaintiff's specific claim upon it. The recording of the mortgage would not operate as a notice of such a claim, and there is no evidence otherwise to show that any other notice was given as to the grass, although it was given as to the wood. In *Bayley v. Greenleaf*, (7 *Wheat.* 44,) it was expressly held that a conveyance by a vendee to a creditor, in satisfaction of a debt, would defeat the equitable lien of the original vendor. The decision of Justice S. B. Strong, to the contrary, in *Hallock v. Smith*, (3 *Barb.* 267,) at special term, can scarcely be considered as of equal authority. An equitable lien is in the nature of a secret trust, which is not favored by our laws, and upon principle should not, I think, be favored against the claims of creditors. Chief Justice Marshall seems to have been decidedly of the opinion, in *Bayley v. Greenleaf*, that it could not be asserted at all, as against the lien of a subsequent judgment creditor or mortgagee. This question is also examined with admirable clearness and force in the notes to *White's Equity Cases*, (1 *Lead. Cases in Eq.* 247-251,) where all the authorities are cited, and the opinion of the chief justice sustained and enforced.

I shall place my decision, however, upon the ground that the plaintiff has no rights in this case beyond what are secured by the terms and conditions of the mortgage, and can only take what the instrument secures to him as a legal right, as against the defendant Lester.

The decree, therefore, can only be for the foreclosure of the mortgage and sale of the mortgaged premises, in the usual form and manner."

The appeal was argued by

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James C. Smith, for the appellant.

S. Mathews, for the respondent.

WELLES, J. The mortgage by Power to the plaintiff provided, in express terms, that the former should deliver without unreasonable delay all the wood he might cut upon the mortgaged premises upon the line of the New York Central rail road, at the place designated, &c. ; and that the plaintiff should have a lien upon all the said wood for the purchase money until the monthly installments should be fully paid, &c. It also provided for a similar lien upon the crops, &c. ; and that Power should, from time to time, on demand of the plaintiff, execute and deliver to him such chattel mortgage or mortgages as might be necessary to protect and perpetuate the same, until the nine monthly installments should be fully paid, when the lien should cease and be discharged. There was no necessity for the lien upon the wood until it was severed from the land, as until then it was parcel of the real estate, and the mortgage, without the provision referred to, by which the lien was provided for, would embrace it ; and a court of equity, except for the provisions contained in the mortgage, by which the mortgagee consented to the cutting of the wood, would have had power to restrain the mortgagor and all others from cutting it. The mortgagee, however, agreed to the wood being cut and sold to the rail road company ; and in the same agreement, and as a part thereof, it was provided that he should have the lien upon all the wood so cut until the monthly payments should be made. That was undoubtedly a valid agreement ; and although it could not take effect until the wood should be cut and severed from the freehold, yet it would attach instantly, as the wood became personal property by being thus detached from the realty. This, I think, was the essence and spirit of the agreement, and it should be enforced against the mortgagor and all others claiming from and through him, with notice of the

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lien thus created. (*Field v. The Mayor &c. of New York*, 2 Seld. R. 179, and authorities there cited.)

The agreement for the lien was neither a chattel mortgage nor a sale of chattels, because, at the time it was made, the subject matter of the lien was not in existence as personal property, (*Edgell v. Hart*, 5 Seld. 213;) and therefore is not affected by the statutes concerning sales and mortgages of chattels. The case shows that the defendant Lester had notice of the prospective lien upon the wood before any of his rights attached, and he therefore was not a *bona fide* purchaser, but took the wood subject to the prior equitable right of the plaintiff.

The provision that the mortgagor should, at the request of the mortgagee, execute chattel mortgages, &c., if by fair interpretation it was intended to apply to the wood to be cut—as to which there may be some question—was, at most, cumulative, and did not, as it seems to me, at all qualify or affect the validity of the lien previously provided for. If the provision for the lien was valid and effectual without the one for the chattel mortgages, it was so with it. It was in the nature of a covenant for further assurance in a deed, which was never held to affect the other covenants or provisions contained in a conveyance.

I cannot agree with my learned brother, who decided this case at the special term, that the provisions in the mortgage respecting the liens, and the giving of chattel mortgages by Power to the plaintiff, was “a mere agreement for the sale of the personal property by way of mortgage, as an additional security at a future day, at the request of the plaintiff.” By giving the provisions in question this restricted interpretation, it is necessary to lay out of view all that the parties have said in the agreement about the lien, and to treat as surplusage a very important provision, plainly expressed by them. This we have no right to do. It was a provision intended, as I think, to secure to the plaintiff a highly valuable right, without which he would have no security, as respected the wood and crops, except the agreement of the mortgagor to give the

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chattel mortgages, and which, in case Power for any reason saw fit to violate it, by refusing to give the chattel mortgages, would leave the plaintiff at the mercy of Power and his creditors, so far as respected the wood and the crops, upon which the liens were to attach. It was competent for the parties to have made just such an agreement as the special term adjudged was made by them, if they had seen fit to do so—in which case it would have been quite unnecessary to insert the provision which they have inserted—that the plaintiff should have a lien upon all the wood and crops for the purchase money, until the payments in the first condition of the mortgage, the aforesaid monthly payments, should be fully paid; but I think they have in fact made quite a different one, as is entirely plain from the language employed by them, and that is just what they have expressed. It is, first, that the plaintiff should have a lien upon the wood upon its being converted into personal property by severance from the land; and second, and in addition thereto, that Power should execute the chattel mortgages, at the plaintiff's request, whenever it should become necessary to protect and perpetuate such lien.

As to the grass or hay in question, there is no evidence that the defendant Lester had any notice or knowledge of the plaintiff's lien thereon before he purchased the same of Power. He must, therefore, be deemed a *bona fide* purchaser thereof, and permitted to hold it, discharged of the plaintiff's lien thereon. (*Bayley v. Greenleaf*, 7 *Wheat.* 46.)

My opinion, therefore, is, that the judgment should be so modified as to direct the defendant Lester to account for the wood taken by him, with interest from the time of the levy thereon; and that neither party recover costs of this appeal.

SMITH, J., concurred.

JOHNSON, J., adhered to the views expressed in his opinion at the special term.

Judgment modified.

[MONROE GENERAL TERM, March 7, 1859. Welles, Smith and Johnson, Justices.]

C. L. SHEPPARD *vs.* WILLIAM HAMILTON.

Where a promissory note is given up by the holder and destroyed, and a new note, valid and capable of being enforced, is accepted in the place of it, the obligations of the parties upon the former note are satisfied and discharged by the new security.

But if, for any reason, the new security is void and cannot be legally enforced, the party holding it is remitted back to his original rights, as they existed at the time the new security was taken; for the reason that the new security being abortive, the consideration of the cancellation or satisfaction of the original security or indebtedness fails, and the indebtedness remains unaffected.

Accordingly, where the holder of a new security, which had been substituted in the place of a former one, brought his action upon it, and one of the makers put in a sworn answer, in which he alleged that the new security was void for usury; held that in a subsequent suit brought against him, to enforce his liability upon the original security, he should not be permitted to deny that what he then alleged, on oath, was true; and that if it was true, there was no valid satisfaction of the debt.

MOTION by the plaintiff for judgment on a verdict taken subject to the opinion of the supreme court. The case was this: In August, 1855, William Whittlesey held a note for \$1000, made by Emery and Peter Thayer, payable on the 1st of November following, *without interest*. On the 29th day of August, 1855, the defendant, Hamilton, became legally bound to Emery Thayer to pay Whittlesey the \$1000 note given by the Thayers. On the 1st of October, 1855, this defendant, Hamilton, negotiated with Whittlesey an extension of time for the payment of the \$1000 which he had undertaken to pay for the Thayers, and consummated the same by delivering to him, Whittlesey, a note made by himself and J. A. Hamilton to the order of Henry Decker, and indorsed by Decker, dated October 1st, 1855, for \$1000, payable in one year, *with interest*; and Whittlesey thereupon gave up the Thayer note, to the defendant, who delivered it to Emery Thayer, by whom it was destroyed.

The second, or substituted note, not being paid when due, the present plaintiff, having become possessed by assignment of all the interest of Whittlesey in both notes and the consid-

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eration of the same, commenced an action on the last one, against the makers and indorser, to recover the amount due thereon. The defendants, in that action, put in an answer to the complaint, signed and sworn to by the defendant in this action, alleging a usurious agreement between Whittlesey and this defendant, by which Whittlesey demanded and consented to receive, and the defendant agreed to pay, a certain sum of money beyond the legal rate of interest, for the forbearance of the sum mentioned in the note then in suit; and that said note was executed in pursuance of such usurious agreement. The plaintiff, on the coming in of said answer, discontinued that action and paid the defendants their costs and disbursements. Afterwards, and on the 2d of March, 1857, Emery Thayer executed to the present plaintiff all his right and interest in the obligation of the present defendant to pay the first mentioned \$1000 note.

This action was thereupon, on the 12th of March, 1857, commenced. The complaint in this action set forth substantially the foregoing facts.

The cause was tried before Mr. Justice JOHNSON, at the Livingston circuit, held in April, 1858. The foregoing facts having been proved, and the plaintiff producing in court the last note, and offering to deliver up the same to the defendant to be canceled, the court directed a verdict for the plaintiff for \$1174.61, being the amount of the first mentioned note with interest, subject to the opinion of this court at general term.

O. Hastings, for the plaintiff.

T. Hastings, for the defendant.

By the Court, WELLES, J. It is not, and cannot be, denied that except for the alleged cancellation of the first note by means of the giving up of the second one, the plaintiff would be entitled to recover of the defendant the amount due upon

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the former. The defendant was legally bound to pay it to Whittlesey, and the plaintiff has acquired by assignment all the rights of Whittlesey and Emery Thayer, with the latter of whom the defendant had contracted to pay it. I think Whittlesey, if he had not assigned to the plaintiff, could have maintained an action against the defendant upon his promise to Thayer. That promise was to pay to Whittlesey. But whatever interest Thayer had in the defendant's obligation to pay the note to Whittlesey is also assigned to the plaintiff, who stands in the place of Whittlesey, clothed with all his rights, with the addition of the rights of Thayer, and subject to all the objections which might be taken to his right to recover if he had brought the action after the discontinuance of the first action, and before he assigned to the plaintiff, except such as might have been made for want of the assignment of Thayer's interest. If the arrangement of October 1st, 1855, between the defendant and Whittlesey, by which the Thayer note was given up to the defendant, and the note of the defendant and J. A. Hamilton delivered to Whittlesey, was valid, so as to be legally enforced, the obligation of the defendant upon which this action rests was satisfied and discharged by the new security taken for it by Whittlesey, and no action can now be maintained upon it. But if, for any reason, such new security is void, and cannot be legally enforced, the party holding it is remitted back to his original rights, as they existed at the time the new security was taken; for the reason that the new security being abortive the consideration of the cancellation or satisfaction of the original security or indebtedness fails, and the indebtedness remains unaffected.

In this case the ground upon which the plaintiff seeks to avoid the effect of the new security is, that it is inoperative and void for usury. The defendant insists that the plaintiff is not at liberty to allege the unlawfulness of the new security, as he would thereby be asserting his own corrupt and unlawful conduct in exacting the usury. The plaintiff insists, in reply, that he has not set up the usury, but was content with the

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new security, and that when he attempted to enforce it by action he was met by the defendant's allegation of the usury. This, I think, is a sufficient reply to the defendant's position. When the plaintiff brought his action upon the last note, the defendant interposed his sworn answer, alleging that the note was usurious and void, and he should not now be permitted to deny that what he then alleged under his oath was true; and if it was true, then there was no valid satisfaction of the debt. In this I think I am sustained by authority. (*La Farge v. Herter*, 11 *Barb.* 159; *S. C. on appeal*, 5 *Seld.* 241.) Judge Ruggles remarks, in his opinion in the court of appeals, in the case referred to, that "a party to an illegal transaction is not allowed, by an allegation of his own turpitude, to recover back what in a forbidden bargain he has delivered to the other party, or to avoid the bargain when once executed." And in another place in the same opinion the learned judge says, "A party to a fraud is estopped from setting it up for his own advantage; but if his opponent alleges and proves it as a part of his own case, the guilty party will then be entitled to the benefit, while he incurs the disadvantage resulting from such a state of things." And to the same effect is the reasoning of Judge Allen in the same case, as reported in 11 *Barb.* See also *Vilas v. Jones*, (1 *Comst.* 274.)

The plaintiff is therefore entitled to judgment on the verdict.

Ordered accordingly.

[MONROE GENERAL TERM, March 7, 1859. Welles, Smith and Johnson, Justices.]

GATES vs. DAVENPORT.

Where one contracts to serve another, for a specific time, he may leave his employer before the expiration of the time agreed upon, if sufficient cause exists to justify such leaving; and he will be permitted to recover for the time he actually served, and in some cases beyond that.

Where there is a provision in the contract that the employee may leave in case of a disagreement, the fact of a *bona fide* disagreement is all that is necessary to entitle either party to put an end to the contract.

Where one contracts with an infant to pay him for personal services, he is not at liberty, after the services have been rendered, and after the infant has become of age, to refuse to pay him, because he was, at the time of contracting, an infant without a guardian; when it appears there was no one entitled to receive his wages.

APPEAL from a judgment of the Steuben county court, affirming a judgment of a justice of the peace. The action before the justice was brought by Gates against Davenport. The complaint was upon an account for work and labor done by one Ryerson Clark for the defendant, which account was assigned by Clark to the plaintiff. The evidence on the trial showed that Clark was under twenty-one years of age when the services were performed. The remaining facts are sufficiently stated in the opinion of the court. The plaintiff recovered judgment before the justice for \$30.34 damages and costs, which was affirmed by the county court.

Hakes & Wetmore, for the appellants.

Bemis & Stevens, for the respondent.

By the Court, WELLES, J. The judgment of the county court should be affirmed. When the account was assigned by Ryerson Clark to the plaintiff, the former was over twenty-one years old. Whatever claim he had against the defendant, therefore, he had a right to assign.

As to his right, after he became of age and before the assignment, to maintain an action upon the claim, I think the evidence would justify the justice in finding that during

the time he worked for the defendant he had no father living. There is no evidence showing that he had one. He swore that during that time his mother was living with her second husband, whose name was William Baker. If that second husband was his step-father, neither such step-father nor his mother was entitled to his services, or bound to maintain or provide for him. There was no one, therefore, but the infant (before the assignment,) or his assignee afterwards, to bring the action. The defendant contracted with him while an infant to pay him for his services, and is not at liberty, after the services have been rendered, to object to paying him because he was an infant without a guardian, when it appears there was no one else entitled to receive his wages.

It was a fair question for the justice, upon the evidence, to decide whether, by the contract, Clark was to be at liberty to terminate the service before the expiration of eight months, and whether he did so for sufficient cause. There was evidence tending to show that by the agreement he was not bound to remain in the defendant's employment any longer than they could agree. Both Clark and the plaintiff testified that the former told the defendant, at the time they were making the contract, and in the same conversation which constituted all the agreement that was proved, that he would not hire for any certain time, or any longer time than they could agree.

It also appears that shortly before Clark left the defendant some unpleasant words arose between them, which was the occasion of the former leaving.

Where one contracts to serve another for a specific time, a compliance with the agreement is generally a condition precedent to the right to recover for the service. But in such case the servant may leave his employer before the expiration of the time agreed upon, if sufficient cause exists to justify such leaving, and will be permitted to recover for the time he actually served the other, and in some cases beyond that. Where, however, there is a provision in the contract for the

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employee leaving in case of disagreement, the fact of a *bona fide* disagreement is all that is necessary to entitle either party to put an end to the contract.

On this question the justice has decided, upon the evidence, or we must now intend that he has so decided, that there was a disagreement, such as, under the contract between Clark and the defendant, would justify the former in leaving the service of the latter.

These views cover all the questions raised by the notice of appeal which we are at liberty to consider.

The judgment of the county court is affirmed.

[MONROE GENERAL TERM, March 7, 1859. *Welles, Smith and Johnson*, Justices.]

WILLIAM LYMAN vs. JOHN S. NEWMAN.

In an action upon a due-bill, or promissory note, by the holder against the maker, the defendant set up as a counter-claim that one N., by an instrument in writing signed by him, became surety for the payee of the note and another person, in the sum of \$200; that N. afterwards died, and at the time of his death there was \$180 due and payable upon the said instrument, which the defendant paid. It appearing that N., who was the father of the defendant, devised certain lands to the latter, upon condition that he should pay the testator's debts, (of which the sum due upon the said instrument was one;) *Held* that the payment so made by the defendant could not be allowed to him as a counter-claim or set-off.

THIS action was brought to recover the amount of a due-bill, or promissory note, for \$71.31, dated December 8, 1856, in the words and figures following:

“*Moscow, December 8, 1856.*

\$71.31. Due Emory Rathbun, or bearer, seventy-one dollars and thirty-one cents, for value received.

JOHN S. NEWMAN.”

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The answer admitted the execution and delivery of the note, and that the same was transferred to the plaintiff for a good and valid consideration—the allegation to that effect in the complaint not being denied. The answer also alleged, in substance, that one Lewis Newman, by an instrument in writing, signed by him at the request of Emory Rathbun, the payee of the note, and Henry Rathbun, became surety for them in the sum of about \$200. That Lewis Newman died November 12th, 1855; and that at the time of his death \$180 was due and payable on said instrument. That, by the last will and testament of said Lewis Newman, the defendant became entitled to certain lands and tenements, upon the payment by him of the debts then owing by said Lewis; and that the defendant, on or about the 15th day of January, 1857, and before the transfer of the said note, paid about the sum of \$80 upon the instrument upon which the said Lewis Newman was so liable, which he seeks to set off in this action against said note. The action was tried before a referee, who reported in favor of the plaintiff for the amount of the note and interest; upon which judgment was entered. The defendant appealed to the general term.

The material facts are sufficiently stated in the opinion of the court.

O. Hastings, for the appellant.

George Hastings, for the respondent.

By the Court, WELLES, J. It seems to me that the alleged counter-claim set up by the defendant was not applicable in this action, and could not in any event be enforced by the defendant against the plaintiff. The will of Lewis Newman, the defendant's father, bears date October 9th, 1855, and the testator died on the 15th day of the same month. By this will the said Lewis Newman devised two thirds of all his real estate, in fee, to the defendant, upon condition that he should pay all his, the testator's, debts and demands which

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he might owe at the time of his death ; and in default of such payment, he directed his executors to let and farm the portion so devised to the defendant for the best price that could be obtained, until the rents and profits over and above expenses should be sufficient to pay and satisfy such debts, and then the said two thirds to go to the defendant. The defendant took the two thirds of the real estate under the will, and paid off the testator's debts. The payment which the defendant made for the benefit of Emory Rathbun and others, and which constitutes his alleged counter-claim, was for a debt which was due from Lewis Newman more than a year before the date of his will. It arose on an undertaking executed by the testator in his lifetime, as surety for Emory Rathbun and others, upon bringing an appeal to the general term of the supreme court, and the testator had become fixed for it before his death by the affirmance of the judgment in the case appealed. It was therefore one of the debts which the defendant was bound to pay, before he was entitled to the benefit of the devise in his favor, and which, in case of his default in payment, were in effect charged upon the land devised to him. It was really his own debt to pay, and his paying it gave him no claim on any one for repayment. It cannot, it seems to me, be contended that he could sustain an action against Rathbun, the payee of the note, under these circumstances, for the amount of such payment ; and if he could not, it puts an end to his counter-claim in this action. The executors of Lewis Newman are the only persons entitled to call on Rathbun for the money thus paid, if any one has that right.

I feel so clear in the foregoing view, that I deem it unnecessary to consider the other questions raised upon the argument.

It follows that the judgment should be affirmed.

Ordered accordingly.

[MONROE GENERAL TERM, March 7, 1859. *Welles, Smith and Johnson, Justices.*]

EMERICK vs. KOHLER.

It is the settled doctrine, in this state, that where the description in a deed clearly designates a piece of land as that conveyed, the description cannot be departed from by parol evidence of intent, or of acquiescence in another boundary line; unless such an adverse possession be shown as is in itself a bar to an ejectment.

Where, in an action of ejectment, the line contended for by the defendant is clearly shown to be erroneous, no acquiescence by the plaintiff, short of twenty years, will bar a recovery according to the true line; unless there be an *estoppel in pais*.

APPEAL from a judgment entered on the report of a referee. The action was brought to recover the possession of a strip of land 32 chains and 33 links long, east and west, and one chain wide at the east, and one chain and 10 links at the west ends, being part of military lot No. 39, in the town of Fayette, Seneca county. The action was, by consent of the parties, referred to James K. Richardson, Esq., to hear and determine. The cause was tried before the referee, who reported in favor of the plaintiff, and judgment was thereupon rendered that the plaintiff recover possession of the premises in question, with costs. The defendant made a case, and brought the present appeal.

J. B. Murray, for the appellant.

A. T. Knox, for the respondent.

By the Court, WELLES, J. The facts found by the referee are, in my judgment, sustained by the evidence; at least, there was evidence given so strongly tending to sustain such findings as to render it improper for this court to interfere with them. Upon those facts the plaintiff was entitled to recover. Stephen Cook was the common source of title of both parties. On the 10th day of July, 1837, by deed of that date, Cook and wife conveyed to the plaintiff, by metes, courses and distances, a piece of land, being a part of military

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lot No. 39, in the town of Fayette, Seneca county. The description of the premises conveyed by that deed has a precise and certain place of beginning, viz: a point in the west line of said lot No. 39, nine chains and $62\frac{1}{2}$ links south from the northwest corner of said lot. This starting point is rendered still more certain by reference to a fixed, permanent natural object; as, the first line from the place of beginning runs east to a certain known black oak tree. The precise starting point in the west line of the lot must therefore be where a line running west from the black oak tree intersects the west line of the lot.

From the black oak tree the line proceeds north, 9 chains and $62\frac{1}{2}$ links, to the north line of the lot. Then east on said line, 7 chains and 12 links; then south, 7 chains; then east, 9 chains and $28\frac{1}{2}$ links; then north, 7 chains to the north line of the lot; then east, on said north line, 6 chains and 80 links to a stone; then south, 25 chains to a stone; then east, 39 chains and 4 links to a stake in the east line of said lot; then south, on said east line, 6 chains and 18 links to a stake; then west, 39 chains and 7 links to a stake; then north, 3 chains and 76 links to a stake; then west, 32 chains and 33 links to the west line of the lot, to a stake in the center of the road; then north, on said west line, 17 chains and 89 links to the place of beginning, containing one hundred acres of land. Upon receiving his deed, the plaintiff entered into immediate possession of the premises thus described, except the part in controversy in this action, and has remained in possession ever since, by his tenant.

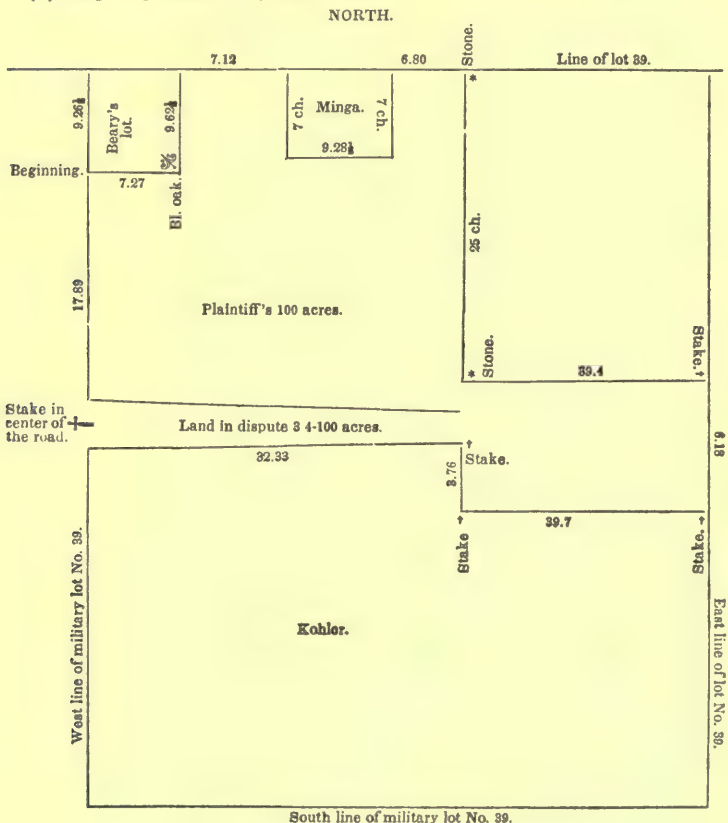
On the 3d day of July, 1840, Cook and wife conveyed to the defendant by deed of that date another portion of said lot No. 39, described as follows, viz: "bounded on the west by the center of the highway, which is the west line of said lot; on the north, by a part of said lot, now or lately owned by John Emerick; on the east by land of John Gambee, and on the south by land of Solomon Savage, and containing 58 acres of land, more or less." The defendant entered into the

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possession of the premises so conveyed to him, in 1838, under a contract to purchase, and continued in possession after the conveyance to him.(a)

It is plain that the defendant's north line is the plaintiff's south line, the latter of which is to be first established in order to determine where the former is. There can be no doubt but the plaintiff's south line can be ascertained from the description in his deed from Cook and wife, with absolute mathematical certainty. On this subject, evidence was given before the referee, who has found that the defendant is in possession of a strip of the land described in the deed to the

(a) Map of premises in question :



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plaintiff, which strip is 32 chains and 33 links long east and west, and one chain wide at the east, and one chain and ten and three-fourths links at the west end, and lying between the fence hereafter mentioned on the north and the plaintiff's south line, according to the description in his deed.

The report also shows that in 1839 one Bachman, the tenant of the plaintiff, and the defendant, erected a division fence between the land of the plaintiff and that of the defendant, extending from the Lusk road, so called, on the east, to another road on the west side of the lot, the distance from road to road being 32 chains and 33 links. That this fence was erected on a line surveyed by John Burton, a few weeks previous to the date of the deed from Cook and wife to the plaintiff, and which Burton then *estimated* to be far enough south to embrace the 100 acres intended to be conveyed to the plaintiff, the other boundary lines being established. That when the deed to the plaintiff was executed, the premises, as described in it, were made to extend farther south than the line previously surveyed by Burton, and so as to include the strip of land now in dispute. That the area of the premises as described in the plaintiff's deed is $99\frac{60}{100}$ acres. That had the description in the deed conformed to the previous survey, (by Burton,) the area would be $96\frac{20}{100}$ acres. That since the erection of said fence, the plaintiff, by his tenant, has been in the actual occupancy of the premises lying north of the fence, and the defendant of the premises south of it, down to the time of the trial. That the plaintiff was cognizant of the erection of the fence and frequently saw it afterwards.

The counsel for the defendant claims that these facts show an acquiescence on the part of the plaintiff in the line run by Burton previous to the execution of the deed by Cook and wife to the plaintiff, from the time of the building of the fence on that line, in 1839, down to the time of the commencement of the present action in 1856, a period of seventeen years; and that he should not now be permitted to set up a title in-

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consistent with that line, or to repudiate it as the true division line between the parties.

I think it may now be regarded as the settled doctrine in this state, that where the description in a deed clearly designates a piece of land as that conveyed, the description cannot be departed from by parol evidence of intent, or of acquiescence in another boundary line, unless such an adverse possession be shown as is in itself a bar to an ejectment. (*Clark v. Baird*, 5 *Seld.* 183–204.) The line contended for by the defendant is clearly shown to have been an erroneous one, and no acquiescence, in such a case, short of twenty years, can bar a recovery according to the true line. To hold otherwise would be, in effect, to abrogate the statute requiring conveyances of land to be by deed, or writing under seal. I desire to be understood to refer exclusively to cases where the doctrine of *estoppel in pais* cannot properly be applied; as, for example, where one party, acting upon the faith of the agreement, express or implied, which is the foundation of every acquiescence, has made expensive improvements, the benefits of which he will lose if the line is disturbed. In such and similar cases, the acquiescence, to be effectual, does not depend upon the length of time it has continued, so much as upon the question, whether the acts were done and expenses incurred upon the faith of the express or implied agreement. (*Baldwin v. Brown*, 16 *N. Y. R.* 359, 364.)

In the present case there is nothing which can amount to an *estoppel*, to conclude the plaintiff from insisting upon the true line, according to his deed.

We think the judgment is in all respects right, and should be affirmed.

Ordered accordingly.

[MONROE GENERAL TERM, March 7, 1859. Welles, Smith and Johnson Justices.]

PIER vs. FINCH and others.

Where a conductor upon a rail road, and his assistants, are sued for assault and battery in forcibly ejecting a passenger from the cars, they cannot be permitted to prove, in their defense, the existence of certain regulations of the rail road company, at the time; that such regulations were reasonable; and that the acts of the defendants, which constituted the assault and battery complained of, were done in conformity with such regulations; unless that defense has been set up in the answer.

APPEAL from a judgment entered at the circuit, upon a verdict for the plaintiff. It is the same case reported in 24 *Barb.* 514. Upon another trial at the Steuben circuit, in January, 1858, the plaintiff recovered a verdict for \$150, upon which judgment was entered. The defendants appealed from that judgment.

S. Mathews, for the appellants.

G. B. Bradley, for the respondent.

By the Court, WELLES, J. The only question in this case worthy of consideration, arises upon the offer of the defendants to give certain evidence, and the decision of the circuit judge thereon, excepting what was disposed of in the plaintiff's favor when this case was before us on a former occasion, on a motion to set aside the nonsuit, as above stated.

The offer of evidence, the overruling of which is now the principal subject of complaint, was to show certain regulations of the New York and Erie Rail Road Company; that such regulations were reasonable, and that the acts of the defendants, which constituted the assault and battery complained of, were done in conformity with such regulations; it having appeared that the defendant Finch was, at the time the transaction took place, a conductor of the train from which the plaintiff was ejected, and the other defendants were hands on the train, acting under the directions of Finch. The case

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shows that the plaintiff's counsel objected to the offer on nine several specific grounds, the second of which was that the evidence was not admissible under the pleadings.

The matter embraced in the offer, if true, and if admissible at all, could only be received as a defense to the action. If the regulations of the rail road company were of any materiality in the case, it was to show that the defendants were justified in removing the plaintiff from the train, provided they acted in conformity with the regulations, and thus to entitle them to a verdict in their favor.

This, most clearly, could not be allowed unless the same had been set up in the answer, which it is not contended was done. (*McKyring v. Bull*, 16 N. Y. R. 297.)

The judgment should therefore be affirmed.

[MONROE GENERAL TERM, March 7, 1859. Welles, Smith and Johnson, Justices.]

 SCRANTOM vs. BOOTH.

Where there is no express agreement, between landlord and tenant, as to the price to be paid by the latter for the use and occupation of premises, the landlord should be allowed what the use of the premises is reasonably worth. The fact that a conversation has taken place between the parties, in which both parties supposed an agreement was made as to the amount of rent to be paid, will not prevent the landlord from recovering upon an implied agreement, where it appears that the parties *differed* in their understanding of the amount to be paid.

APPEAL by the plaintiff from a judgment entered on the report of a referee. The action was brought to recover for the defendant's use and occupation of a portion of the plaintiff's building, being a store, situated on the west side of Buffalo street in the city of Rochester. It appeared that the defendant was a jeweler and watch repairer by occupation,

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and the building had two front windows prepared for carrying on that business. For several years prior to September, 1848, the defendant had occupied the east of these windows, and had paid the plaintiff therefor one dollar per week, the parties rendering mutual services for each other while the defendant so occupied said window. In October, 1849, the plaintiff and defendant made another agreement, by which the defendant was to have the west window, and in return therefor was to teach the plaintiff's son the trade of a jeweler and watch repairing; the parties to assist each other in their business. The parties went on under this agreement about six weeks, when it was broken up; the son abandoning the project of learning said trade; whereupon an agreement was made between the parties, that the defendant should pay the plaintiff for the use of the west window \$2 per week; that this arrangement continued about four weeks, when another arrangement was entered into between the parties, by which the defendant changed to the east window, and continued to occupy it for the period of 174 weeks, or down to May 1st, 1853, when he left. There was, at the time of making the last arrangement, a misunderstanding between the parties in reference to the price to be paid by the defendant for the use of the east window. There was reference to a former agreement for the price; the plaintiff understanding the reference to be to the previous four weeks' use of the east window at \$2 per week, and the defendant understanding the reference to be to the previous occupancy of the said east window at \$1 per week. The defendant, during the time he so occupied the east window under the last arrangement, made semi-annual payments of rent of \$25 each, in cash, and one gold watch on the same account, amounting in value to the sum of \$30; the whole amount of payments so made being \$180. The parties were, during the entire period of the defendant's occupancy of said window, to perform mutual services for each other.

The foregoing facts were found by the referee before whom the action was tried. As a conclusion of law, he found that

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the defendant could not be made liable for his occupancy of said window, beyond the amount of one dollar per week, stating the demands of the parties, as established before him by the evidence, as follows: That the plaintiff was entitled to recover

For 174 weeks' use of the premises at \$1 per week, \$174 00

For 4 weeks' use of premises at \$2 " 8 00

\$182 00

The defendant to be allowed, cash paid, \$150 00

" " gold watch, 30 00—180 00

And found due the plaintiff \$2 00

Upon which report judgment was entered. There were other facts in evidence, as shown by the case, which are sufficiently referred to in the opinion of the court.

The plaintiff appealed.

E. A. Hopkins, for the appellant.

J. W. Stebbins, for the respondent.

By the Court, WELLES, J. The referee reports, in substance, that as to the price to be paid by the defendant to the plaintiff for the use of the east window, there was no express agreement between the parties. His finding on that subject is, that there was a misunderstanding between them; the defendant supposing he was to pay the same price he had formerly paid for the use of that window, which was one dollar per week, and the plaintiff, that the price was to be what the defendant had then lately agreed to pay him for the use of the west window, which was two dollars a week. There was therefore no express agreement between them on the subject of the price of the east window. There was wanting the essential ingredient of an agreement, the coming together and mutual assent of the minds of the parties on the subject of a particular price.

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Under such circumstances the plaintiff should have been allowed what the use of the window in question was proved to have been reasonably worth. It is possible the referee would have found from the evidence that \$1 per week was all that it was reasonably worth, provided he had passed upon that question; or it might have been more or less. But he has not passed upon that question, although much evidence was given on the subject, by both parties. The referee has allowed the plaintiff only \$1 a week, upon the ground that as the defendant understood the contract, that was the price agreed upon; although the plaintiff had in fact agreed to no such thing, but supposed the defendant had agreed to pay him \$2 a week.

The referee seems to have supposed there was no other standard, or measure of allowance, than the amount which was in the mind of the parties, or one of them, at the time the agreement was made, and that the defendant could not be made liable beyond the price which he understood it was agreed he was to pay; that the plaintiff could not recover upon an implied agreement as to the price, because the evidence showed that both parties understood there was a price agreed upon, and because, as the referee supposed, the law would not imply a promise different from the understanding of either of the parties; which promise the evidence shows was never made, and which might compel the defendant to pay more than the plaintiff, or less than the defendant expected. In this, we think, the referee erred. Assuming, as the referee has found, that there was no agreement as to the price, it was the duty of the defendant to pay what the premises were reasonably worth during the time he enjoyed the use of them; and the law will imply a promise by the defendant to discharge such duty by paying what the use of the premises was worth. Where a valid express agreement is proved, none is ever implied, because the express promise supersedes the necessity of an implied one. It is only where there is no express agreement which can be enforced, that the law will imply one;

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that is, will impute a promise, or intend that one was made. And such implication will always exist where equity and justice requires the party to do the thing in question, even though it expressly appears that he never actually made the promise or agreement which by such implication the law attributes to him; but on the contrary, always repudiated his liability and refused to promise.

The judgment should therefore be reversed, and a new trial granted before the same referee, with costs to abide the event.

If, upon another trial, the referee should find there was no express agreement between the parties, as to the price the defendant was to pay for the use of the east window, then he should find from the evidence what such use was reasonably worth, and allow the plaintiff accordingly.

In regard to the difficulty suggested by the referee, that the evidence might lead to the conclusion that such use was worth less than the defendant or more than the plaintiff understood was settled by the contract, I do not see that he can properly attach any importance to what either party expected, or understood was provided in the contract, inasmuch as the idea of a contract price is to be laid out of view; the evidence, on this hypothesis, wholly failing to prove an agreement.

Judgment reversed.

[MONROE GENERAL TERM, March 7, 1859. Welles, Smith and Johnson, Justices.]

FIELD vs. THE NEW YORK CENTRAL RAIL ROAD COMPANY.

The fact that the defendant is a corporation, and therefore cannot be examined as a witness in its own behalf, will not prevent the plaintiff from offering himself as a witness, and being examined, in support of his claim.

The provision of the code, that "whenever a party or person in interest has been examined" as a witness, under the 399th section, "the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received," should be construed to extend only to cases where the party against whom the other party has been examined is a natural person, capable of giving evidence, and a competent witness, provided he had not been a party or person in interest.

A PPEAL from a judgment at the circuit court, entered on the verdict of a jury.

H. R. Selden, for the appellants.

J. H. Martindale, for the respondent.

By the Court, WELLES, J. The action was brought to recover the value of certain quantities of cord wood and fence of the plaintiff, burned and destroyed in May, August and September, 1854, in consequence of fire scattered along the track of the defendants' road from their locomotive engines, through the negligence of the defendants. The plaintiff recovered a verdict, upon which judgment was entered in his favor.

Upon the trial at the Monroe circuit, in October, 1857, before Mr. Justice JOHNSON, the plaintiff was offered as a witness in his own behalf. The defendants' counsel objected to his examination, on the ground that the adverse party could not be examined, and therefore the plaintiff could not; and that the act under which it was sought to examine the plaintiff, does not provide for the examination of a party, except when the adverse party or person in interest is living, and capable of examination. The court overruled the objection, and the defendants' counsel excepted.

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It will be seen, by reference to section 399 of the code, that the rule of exclusion of a party as a witness in his own behalf is not as broad as the objection in this case contemplated. The limitation or restriction in the section referred to is as follows: "But such examination shall not be had, * * * unless the adverse party or person in interest is living, nor when the adverse party shall be the assignee, administrator, executor or legal representative of a deceased person," nor unless notice &c. is given. The defendants, who are the adverse party here, are neither an assignee, administrator, executor nor legal representative of a deceased person. The defendants' counsel contends that the adverse party in this case cannot be said to be living, because it is not a natural person, and only exists in contemplation of law, and therefore cannot be examined as a witness in its own behalf, or be received as such witness. But I think, nevertheless, that the plaintiff was a competent witness. The cause was tried while the code, as amended in 1857, was in force. Prior to those amendments, the 399th section, in specifying or enumerating the adverse parties or persons in interest against whom an assignor could not be examined as a witness, contained the following provision: "But such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him, against an assignee or an executor or administrator, unless the other party to such contract or thing in action whom the plaintiff or defendant represents, is living, *and his testimony can be procured for such examination*," &c. If these last words had been contained in the amendment of 1857, in the limitation of adverse parties against whom a party could be examined as a witness, I should have been of the opinion that the section would not apply to a case where a corporation was a party; because such a party could never be a witness. But in the section as it now stands, the part in it which qualifies and limits its first proposition—that a party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness—those qualifying

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words are left out. The first proposition is general, and embraces all cases where the party to whom the right of being examined is secured, is a person who can be examined, and is to be so interpreted and applied, subject only to the restrictions which immediately follow, which are to be regarded in the light of exceptions to the general leading proposition of the section. The clause near the middle of the section, relied upon by the defendants' counsel, that "whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received," should be construed to extend only to cases where the party against whom the other party has been examined is a natural person, capable of giving evidence and a competent witness, provided he had not been a party or person in interest. Thus the provision can have an extensive operation, and take effect in a large majority of cases. It is, I think, sufficient to say, that the provision does not occupy a position in the section or a relation to the subject matter to qualify and limit the operation of the first clause, securing to each party, in general terms, the right to be examined as a witness in his own behalf in regard to the character or class of persons against whom he may be so examined. It cannot, as it seems to me, be said that the defendant is not living. It is as really living as it ever was, and is a living party in the contemplation of the section. It has a life, the continuance of which is far more certain than that of a natural person. It is a person as really and actually as an individual is one; the only difference in this respect being, that one is an artificial and the other a natural person. I think the legislature could not have intended to exclude from the operation of the section so large a class of cases as those where a corporation happens to be a party, without so expressing it; especially when we see certain other large classes of cases are excluded in express terms.

If it is necessary to find the reason for the design which this interpretation attributes to the legislature, I think it is

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apparent, first, from the general scope and object of the section, which was evidently to put all parties as nearly as possible upon an equality, without giving one an undue advantage over another, and to restrict the rule to those cases where each of the parties to the action is presumed to know as much about the case as his adversary, and therefore to exclude its operation in cases where either party prosecutes or defends, *en auter droit*. Second, this will not operate unequally or unjustly upon a corporation who is a party and his adversary a natural person, but was manifestly necessary in order to produce equality in this respect. Before the amendment of 1857, corporations possessed an undue advantage over natural persons. They transacted all their business by and through agents, who were competent to testify, and who are presumed to have all the knowledge of facts that the other party possessed, or at least as much as their principal, provided he had been a natural person, would have had. They, or some one or more of them, must have been acquainted with every transaction to which their principal had been a party or had been engaged in, and, unless personally disqualified to be witnesses in any case, were all competent at common law, or might be made competent, to testify in relation to them. This is a full equivalent to the right secured to natural persons, by the amendment of the code, to become witnesses in their own behalf.

The other rulings at the circuit we have considered, and think they were all unobjectionable.

The judgment should therefore be affirmed.

[MONROE GENERAL TERM, March 7, 1859. Welles, Smith and Johnson Justices.]

SACKETT *vs.* SPENCER.

An instrument in these words: "Due A. Y., or bearer, three hundred and forty dollars, for value received, with interest, at L.'s office in Rochester," is a promissory note, within the statute; and not being payable at any specified time after date, the maker is not entitled to any days of grace.

And being, by its own express terms and legal effect, due and payable at the moment of its execution and delivery, such a note cannot be transferred so as to cut off any defense existing in behalf of the maker at that time.

A witness may be allowed to refer to his cash book, to refresh his recollection; but after having sworn positively, he cannot refer to his cash book for the purpose of corroborating his testimony.

In an action upon a promissory note, a teller in a bank was shown the note, with a guaranty written across the back, and the defendant offered to prove by him that the portion of the guaranty written across the fold in the paper was written since the paper had been folded and soiled, or stained; and to ask him whether, in his judgment, from the lustre and brightness of the ink, the guaranty could have been written as long as six years ago. *Held* that upon these questions the opinions of witnesses were not admissible, even though the witnesses were *experts*.

Where there is a question as to the credibility of witnesses, and there is evidence in conflict with their testimony, which ought to be submitted to a jury; and where there are exceptions in the case, in regard to the admissibility of testimony; it is improper for the judge, at the circuit, to take the case from the jury and direct a verdict for the plaintiff subject to the opinion of the court at a general term.

Such a direction is admissible only when the case presents questions of law alone.

MOTION for judgment on a verdict taken for the plaintiff at the circuit, subject to the opinion of the court. The complaint alleged that the defendant, on the 4th day of October, 1851, at Lima, in the county of Livingston, made his promissory note in writing, dated that day, in the words following, viz:

"\$340. Due Anthony Yorks, or bearer, three hundred and forty dollars, for value received, with interest, at Leicester's office in Rochester.

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October 4, 1851."

And then and there delivered the same to Anthony Yorks; that the said Anthony Yorks afterwards, and on the 5th day of October, 1851, sold and transferred the same to the plain-

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tiff, who thereby then and there became the bearer thereof; that the plaintiff is now the lawful owner and holder of said note; and that the defendant has not paid the same, or any part thereof, but is justly indebted to the plaintiff therefor; wherefore the plaintiff demanded judgment against the defendant for \$340, with interest from the 4th day of October, 1851, besides costs.

The defendant, by his answer, denied the allegations of the complaint; and for a further defense, alleged that the plaintiff ought not to further have or maintain his action against him, because the note in the complaint mentioned was made at the request and for the accommodation of Anthony Yorks, the payee therein named, without any value or consideration therefor, and was transferred by said Anthony Yorks after the same became due and payable, and without any valuable consideration therefor. And that after said note became due and payable, and while the said Anthony Yorks was the owner and holder thereof, the defendant paid to said Yorks said note, and all moneys and interest due thereon, to wit, on the 5th day of October, 1851. And for a further defense, that Yorks assigned and transferred the note after the same became due and payable, and before and at the time of said assignment or transfer the said Yorks was, and still is, indebted to the defendant in the sum of \$500, for work and labor, goods, money paid, had and received, lent and advanced &c., and for the rent, use and occupation of a certain dwelling house in Genesee, with the appurtenances, before then occupied by one Alexander C. Vimble, for which Yorks became surety and guarantor; which said sums of money so due and owing from the said Anthony Yorks to the defendant, exceeded the amount of the indebtedness claimed in the complaint; and which money so due and owing by the said Anthony Yorks to the defendant, the defendant claimed to set off and be allowed against any claim of the plaintiff in this action.

On the trial the plaintiff, to sustain his action, produced and read in evidence the note or due-bill described in the com-

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plaint, the execution whereof was admitted by the defendant. The defendant examined Homer Sackett, the plaintiff, as a witness, who testified that he first saw the note in question about a year ago; that he kept it some two or three months, and sent it to Mr. Wood in a letter; that he paid something over \$400 for the note, part in his own note and part in an account due him. The plaintiff offered to show by this witness that he bought the note of William E. Pattee. The defendant objected, on the grounds, 1st. That the complaint alleged that the note was sold and transferred by Anthony Yorks, the payee, to the plaintiff, and that Pattee was not named in the complaint. 2d. That it was not competent for the plaintiff to prove facts necessary to constitute his cause of action not alleged in his complaint. 3d. That he could not do this when the facts which he proposed to prove were in direct conflict with facts alleged in the complaint. The court overruled the objections, and the defendant excepted. The defendant then introduced evidence tending to show that the note in question was given by him to Yorks, in exchange for one given to the defendant by one A. McDonald, and that Yorks had appropriated the proceeds of the latter note to his own use. Yorks was examined as a witness for the plaintiff, who offered to prove by him that the note sued on was transferred to William E. Pattee the next day after it became due. This was objected to by the defendant's counsel, on the ground that the complaint alleged the transfer by Yorks to the plaintiff; that the evidence offered not only tended to prove facts necessary to constitute the plaintiff's cause of action, and which were not alleged in his complaint, but which were in direct conflict with the material facts alleged in the complaint and denied by the answer. The court overruled the objection and received the evidence. The defendant Spencer was examined as a witness, and testified that he had borrowed money of Yorks, but did not borrow any such amount of money mentioned, in the month of October, 1851. The defendant's counsel proposed to show by this witness, by allowing him to refresh his mem-

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ory, on reference to his cash book and memorandum kept at that time, that he did not receive any money from Yorks at or about that time. The plaintiff objected. The court sustained the objection, and the defendant excepted. Rodney Whitney, called by the defendant, testified that he was teller of the Genesee Valley Bank. The witness was shown the note, and the guaranty written across the back. The defendant offered to prove by him that the portion of the guaranty written across the fold in the paper made lengthwise, was written since the paper had been folded and soiled, and since it had been stained; and also, to ask him whether in his judgment, from the lustre and brightness of the ink, the guaranty could have been written as long as six years ago. The counsel for the plaintiff objected, on the ground that this was not a question of skill or science to which evidence may be given by experts, but a matter for the court and jury to decide. The court sustained the objection and excluded the evidence. The evidence being closed, the plaintiff claimed and insisted that he having shown by evidence that the note was transferred by Yorks to Pattee the next day after its date, the defense was not available or allowable as against the plaintiff in this action, as a question of law, and that there was no question of fact for the jury to pass upon, and moved that the court take the case from the jury, and direct a verdict for the plaintiff for the amount of the note and interest. The defendant objected, and insisted, 1st. That the note, if transferred at all, was transferred after it became due, and was subject to the same defense as if the action had been brought by Yorks, the payee, as a question of law. 2d. That it was a question of fact to be submitted to the jury, whether, upon the whole evidence in the case, the note was not executed and delivered by the defendant to Yorks at the time and under the circumstances, and for the consideration stated and testified to by the defendant. 3d. That the court ought to charge the jury that if, from all the evidence in the case, the jury should find the facts to be as testified to by the defendant, the note was

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void for want of consideration ; or, if the court should be of the opinion that there was sufficient consideration to uphold the note as between the defendant and Yorks, that then the defendant was entitled to have applied as a set-off or counter-claim against the amount claimed on said note, the proceeds of the McDonald note, which all the evidence showed was received by Yorks. The court sustained the motion of the plaintiff, and decided, as a question of law, that what the defense claimed and proved was not allowable as against the plaintiff; and also that there was no question of fact for the jury to pass upon, and took the case from the consideration of the jury, and ordered a verdict in favor of the plaintiff for the amount of the note and interest, subject to the opinion of the court at general term. The jury thereupon, under the direction of the judge, rendered a verdict for the plaintiff for the amount of the note and interest. Whereupon his honor, the judge, ordered and directed the case and exceptions to be heard, in the first instance, at the general term.

J. C. Smith, for the plaintiff.

D. G. Stuart, for the defendant.

By the Court, E. DARWIN SMITH, J. The instrument upon which this action is brought is a promissory note, within the statute. (*Kimball v. Huntington*, 10 *Wend.* 675. *Russell v. Whipple*, 2 *Cow.* 536.) Being payable at no specified time after date, like a note payable on demand, the maker was not entitled to any days of grace. (*Story on Bills of Ex.* § 342. *Chitty on Bills*, 410.) By its own express terms and legal effect it was due and payable *immediately*, and the statute of limitations would run, upon it, from its date. (8 *John.* 189, 374. 15 *Wend.* 308. 3 *Denio*, 12. 13 *id.* 267.) The holder Yorks could have sued it the next hour after its delivery. The fact that it was payable at "Leicester's office" in Rochester, with interest, as in the case of a note payable

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at a bank, if funds were there to meet it, would stop interest, and implies, I think, that it was not expected to be immediately paid or presented for payment. But it was nevertheless *due immediately*, and payment of it could have been instantly required by the holder. Being thus *due* at the moment of its execution and delivery, the note could not be transferred so as to cut off any defense existing in behalf of Spencer at that time.

But, upon the defendant's own testimony, there was obviously no defense to the note in the hands of Yorks, or any equity to defeat it before Yorks appropriated the proceeds of the McDonald note to his own use, for which note the defendant states the note in question was given in exchange. Up to the 8th of November, 1851, the date of the order of Yorks upon Spencer's attorneys for the proceeds of the McDonald note, the defendant's note was a perfectly valid note in Yorks' hands; and any purchaser or assignee of it, who received a transfer thereof in good faith and upon good consideration, would acquire a perfect title to it, free from all defense on the part of the defendant. If the note was given in exchange for the McDonald note, when Yorks took or appropriated the avails of that note to his own use, and from and after that time, the defendant had a perfect defense to the note in the hands of Yorks, or of any person who should receive it from him after that period. It thus becomes an important inquiry *when* the note was in fact transferred. If transferred on the 5th day of October, 1851, as sworn to by Yorks and Pattee, there is, and could be, no defense to it in the hands of the plaintiff. In his complaint the plaintiff alleges the making of the note and its delivery to Yorks on the 4th of October, 1851, and sets out a copy, and then alleges that the "said Yorks afterwards, and on the fifth day of October, 1851, sold and transferred the same to the said plaintiff, who *then* and *there* became the bearer thereof." This is a distinct positive allegation that the note was transferred to the plaintiff by Yorks on the 5th day of October, 1851. The production and

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proof of the note was *prima facie* evidence to support this allegation, and entitled the plaintiff to recover, if nothing further had appeared in the cause. Having made this proof the plaintiff rested, and the defendant called the plaintiff as a witness, who disproved this *prima facie* case, and showed that he acquired title to the note about a year before the trial, (which was in January, 1858.) Upon this proof the defense was not cut off, but was entirely available.

The plaintiff then proposed to prove that the note was transferred the next day after its date, not to the plaintiff, but to a man by the name of Pattee, who transferred it to the plaintiff. This proof was objected to and received, and this presents the first exception for consideration. I am inclined to think this exception, since the code, well taken, and that the evidence ought not to have been received, without an amendment of the complaint, which would have entitled the defendant to have the cause go over the circuit, if he could have satisfied the court that he was misled or surprised, under section 169 of the code; but as I think there must be a new trial upon other grounds, and there is some doubt on this point, it is unnecessary to pass upon it now, as there can be no pretense of surprise in respect to this proof, on a second trial.

The exception to the decision overruling the testimony relating to the defendant's cash book is not well taken. The defendant might refer to his cash book to refresh his recollection, but could not give the cash book in evidence. He had sworn positively on the subject, and had doubtless previously consulted his cash book; and I do not understand the decision to have denied to the defendant the right to refer to his cash book before testifying, but after he had given his testimony, to corroborate such testimony. For this purpose it was inadmissible to refer to it, and the decision was clearly right. The exception to the decision of the court, overruling the evidence offered by Whitney, I think, was not well taken. The question to which he was called to testify was not pecu-

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liarily within the knowledge and competency of *experts*, if Whitney were in fact an expert in regard to handwriting. The jury were all qualified to examine and judge, from the appearance of the paper, whether the guaranty indorsed on the note was recently made or otherwise. They were entitled to inspect it, and base their verdict upon their own judgment and the evidence of their own senses from and upon such inspection. I think the question was not one upon which the opinions of witnesses were admissible. (*Greenl. Ev.* 488. 5 *Seld.* 376 and 80. 4 *Denio*, 373.) The evidence of experts has been allowed, in some instances, to show that a signature was in a simulated hand, but this is now disapproved of. (1 *Denio*, 343. And it was expressly held in 13 *Wend.* 81, that it was inadmissible to show by the opinions of experts at what *time* entries in an account were made; and this case is precisely in point upon this exception.

But I am inclined to the opinion that the case should have been submitted to the jury. It is true Yorks and Pattee swore positively as to the transfer on the fifth of October, and if the jury believed their testimony, they would have been bound to find a verdict for the plaintiff. But the question of their credibility was a question for the jury, and there was certainly considerable evidence in conflict with their testimony. The staleness of the claim, the time and manner of the alleged transfer to Pattee, the appearance of the indorsement, the neglect of Pattee ever to ask for payment of the note through some five years, when it appeared he was embarrassed and had judgments and executions against him, and the conflict between the statements of Spencer and Yorks in regard to the consideration of the note and other particulars, presented circumstances tending to impeach the testimony of Yorks and Pattee, which might, I think, well have been submitted to the jury. If in view of the intrinsic facts of the case and all the testimony before them, the jury had found a verdict for the defendant, as it would necessarily have been based upon a disbelief on their part of the testimony of Yorks

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and Pattee, I do not think this court would have been bound, if at liberty, to set it aside. And this is the rule, as I understand it, upon which the judge at the circuit is at liberty to take the case from the jury. For the same reasons, and also because there are various exceptions in the case in regard to the admissibility of testimony, I think it was not a proper one in which to direct a verdict subject to the opinion of the court at general term. That is admissible only when the case presents questions of law alone. (*Code*, § 365.) This must be upon the whole case, and where there are no exceptions for the reception or rejection of evidence. (16 *N. Y. R.* 604, 606.) I think, therefore, that there should be a new trial of the cause, with costs to abide the event.

New trial granted ; costs to abide event.

[MONROE GENERAL TERM, March 7, 1859. *Welles, Smith and Johnson*, Justices.]

MARTIN *vs.* CAMPBELL and others.

The plaintiff held certain promissory notes made by C., and the defendant guarantied the payment thereof. C. becoming insolvent, made an assignment of all his property, to the defendant and others in trust, for the payment of his debts, which instrument contained a direction for the payment to the defendant of whatever sum he might or should pay in consequence of the said guaranty. Judgment was subsequently recovered against the defendant, upon his guaranty, and an execution issued thereon was returned unsatisfied. *Held* that as soon as the defendant's liability to pay the plaintiff became *fixed* by the judgment against him, it was the right of the plaintiff, in equity, to have the fund provided by the principal debtor applied in its payment ; and that the assignees of C. could not divert that fund to any other purpose.

Held also, that the defendant being himself the trustee, or one of the trustees, and having the funds in hand to meet the sum due upon the guarantied debt, was bound in equity, in conjunction with his co-assignee, at once to apply them for that purpose ; and that he could not be permitted to put his creditor at defiance on the ground of his personal inability to pay the debt, in the first instance, from his own means.

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THIS was an appeal by the defendant Campbell, from an order overruling his demurrer to the plaintiff's complaint. The complaint stated that the plaintiff was the holder of nine several promissory notes against Timothy Chapman, amounting together to \$10,000, and that the defendant Campbell, on the 12th of January, 1853, executed to the plaintiff a guaranty of the payment of these notes. That subsequently, and on the 10th of August, 1853, Chapman, having become insolvent, made to the defendants an assignment of all his property and effects in trust for the payment of his debts, giving preferences. That in the assignment so made, there was the following direction: "Also to pay to James C. Campbell of Rochester, New York, whatever sum he may or shall pay in pursuance of, or in consequence of, said Campbell's certain guaranty of nine certain promissory notes, made by me to John T. Martin of New York city, amounting to ten thousand dollars, and interest thereon, after becoming due, and which said guaranty bears date January 12th, 1853, signed by James C. Campbell." The complaint then stated the recovery of judgment upon the guaranty against Campbell, and the issuing of an execution thereon, and its return *nulla bona*. That the defendants had funds in their hands, after the payment of debts of a prior class, for the payment of this debt, and prayed that they might be compelled to pay to the plaintiff the debt out of such funds. The defendant Campbell demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

S. Mathews, for the appellant. I. By the true construction of the assignment from Chapman, the trustees are not authorized to pay any thing upon the plaintiff's debt, except to Campbell, and not to him until he shall have paid something upon his guaranty. (*Gilbert v. Wiman*, 1 Comst. 550. *Scott v. Tyler*, 14 Barb. 202.)

II. It was clearly the intention of the assignor, in the instrument of assignment, to indemnify Campbell, who was his

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surety, only in case of payment, and for such sum only as he should actually pay. It was not his intention to prefer the plaintiff, or provide for the payment of the plaintiff's debt, only so far as payment might be made by Campbell. The direction to the trustees to pay is made contingent upon the prior payment by Campbell. (*Scott v. Tyler*, 14 Barb. 202.)

III. The right of the plaintiff to maintain this action must depend upon the fact whether the trustees are liable for the payment of the debt to Campbell. The plaintiff, in effect, asks to be subrogated to the rights of Campbell. But Campbell cannot compel any payment to him, until he shall himself pay something to the plaintiff. To allow the plaintiff to maintain this action, would be to give him a preference over other creditors equally meritorious, and contrary to the plain and obvious intention of the assignor.

J. L. Angle, for the plaintiff. It is a settled rule in equity, that creditors shall have the benefit of any counter bonds or collateral securities which the principal debtor has given to the surety, or person standing in the situation of surety, for indemnity. Such securities are regarded as trusts for the better security of the debts, and chancery will compel the execution of the trusts for the benefit of the creditors. (*Per Bronson, Ch. J., Vail v. Foster*, 4 Comst. 312, 314, and other cases cited by him. *Moses v. Murgatroyd*, 1 John. Ch. Rep. 119, 129. 1 Story's Eq. §§ 502, 638.)

By the Court, E. DARWIN SMITH, J. The provision in the assignment of Chapman, for the payment to the defendant Campbell, of whatever sum he may or shall pay in pursuance or consequence of said Campbell's guaranty of the nine promissory notes of Chapman to the plaintiff, therein mentioned, is not a distinct preference in behalf of the plaintiff, of his debt, but a mere provision of indemnity to Campbell against his liability for its payment. It was doubtless supposed, at the time of making this assignment, by the parties,

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that there was some question in respect to Campbell's liability on his guaranty of said notes, and it was probably the intention of the parties to contest in the courts such question; and this provision in the assignment was designed as a contingent indemnity to Campbell against any such sum as he should be ultimately compelled by law to pay, by reason of his guaranty of said notes. Campbell obviously was not expected to pay these notes voluntarily; but if compelled to pay them by law, then he was to be indemnified for such payments, by the assignees of Chapman, from the proceeds of the assigned property. Campbell, accordingly, has contested his liability on his guaranty of said notes, and a recovery of the amount thereof has been had against him; yet, though executions have been issued against him, and the same have been returned unsatisfied, he has not yet paid any thing or been compelled to pay any amount in satisfaction of such judgments, or in discharge of his liability on such guaranty. As Campbell has not thus yet sustained any loss or paid any sum whatever, upon such notes, it is claimed by the counsel for the defendants that this provision in the assignment is inoperative, and that as he could not maintain any action upon it, his creditor, the plaintiff, cannot. This doubtless would be so at law, within the cases of *Gilbert v. Wiman*, (1 Comst. 530,) *Scott v. Tyler*, (14 Barb. 202,) and numerous others, but I think it is not so in equity. This provision in the assignment is certainly a collateral security to Campbell against his liability on his guaranty of these nine notes held by the plaintiff at the time. Judgments having been recovered against him on such guaranty, a *clear, fixed and certain duty* rests upon him in law and equity to pay such judgments. As one of the assignees of Chapman, he has virtually in his own hands, or in connection with his co-assignees, a fund expressly created and appropriated to pay this debt. This fund is a security provided by the principal debtor for that purpose; and it is a settled principle in equity that when the principal debtor has given to his surety any securities for his indemnity, such securities are

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regarded as *trusts* for the benefit of the creditors. (4 *Comst.* 312. *Vail v. Foster*, 1 *Story's Eq.* 55, 502 and 638.) As soon as Campbell's liability to pay the plaintiff became *fixed* by the judgment against him, it was the right of the plaintiff, in equity, to have the fund provided by the principal debtor applied in its payment. The assignees of Chapman could not divert this fund to any other purpose. It was provided and set apart expressly to meet this liability of Campbell. His insolvency cannot operate to discharge or diminish his claim, that the fund remain unappropriated in the hands of the assignees, in sacred trust to meet this debt, so long as his liability for its payment remains. Equity considering this fund as thus set apart expressly to pay this debt, and that it is Campbell's duty to pay the same, lays hold of the fund in the hands of the assignees, and appropriates it at once for the payment of the debt for which it was created and set apart. It seems to me quite clear that Campbell being himself the trustee, or one of the trustees, and having the funds in hand to meet this debt, is bound in equity, in conjunction with his co-assignee, at once to apply it for that purpose, and cannot be permitted to put his creditors at defiance on the ground of his personal inability to pay this debt, in the first instance, from his own means. What he is, in law and equity, bound to do, he should be deemed so far to have done, as to entitle him to claim and appropriate the funds in the hands of the assignees for the discharge of the plaintiff's debt. It is Campbell's right and duty, upon this hypothesis, to claim the appropriation of the funds in the hands of the assignees to discharge this debt, and the plaintiff has a right, through this court, to claim the enforcement of such duty, and to reach the fund for the payment of his judgments. I think the decision of the special term overruling the demurrer to the plaintiff's complaint should be affirmed.

Order affirmed.

[MONROE GENERAL TERM, March 7, 1859. *Welles, Smith and Johnson*, Justices.]

N. H. GALUSHA *vs.* SYLVESTER HITCHCOCK.

An action at law cannot be maintained upon a contract for the sale and conveyance of land, by the assignee of the vendor, against the husband of the vendee, who did not sign or execute the contract, to recover an installment of the purchase money.

Where a wife acts as agent of her husband, and makes an express contract in writing, she can bind him thereby, only by executing the same in his name, and professedly as his agent, as in the case of all other agents.

If the contract is executed by the wife in her own name, it cannot be made out to be the contract of the husband, except by parol proof; which is inadmissible for that purpose.

A PPEAL by the defendant from a judgment rendered at a special term in favor of the plaintiff, for \$305.03 damages and costs. The facts appear in the opinion.

W. F. Cogswell, for the appellant.

J. Van Vorhis, Jr., for the plaintiff.

By the Court, E. DARWIN SMITH, J. The plaintiff is the assignee of a contract to convey land, executed by Martin Galusha and Diana S. Hitchcock, the wife of the defendant. In the articles of agreement the said Martin Galusha agreed to sell and convey on the payment of the purchase money at the time and manner therein specified, and the said Diana S. Hitchcock agreed to purchase on such terms, the land and premises therein described. It does not appear by the complaint that the title to the premises has been conveyed to the plaintiff, or that he has any power to perform the contract on the part of the said Martin Galusha. He is a mere assignee of the money due on such contract, and this action is a suit at law for the recovery of an installment of \$205 which became due by the terms of said contract on the 1st of December, 1856—the whole purchase money being \$840, of which \$705.52 remains unpaid, including said sum of \$205 which had become due and payable. This action is therefore a simple

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action at law upon the contract, by the assignee of the vendor for an installment due of \$205, not against the vendee, Diana S. Hitchcock, named in the contract, but against the defendant as her husband, who did not sign or execute the contract, and is not named in it, and has incurred no express legal obligation for the purchase of the land described in the contract. The claim of the plaintiff is, that the execution of the contract by the wife was in legal effect an execution by her as agent for her husband, and that he is bound by the contract as duly executed by himself. It seemed to me at the trial quite clear that this claim could not be maintained; but the counsel for the plaintiff presented so large an array of authorities, and the law in respect to husband and wife has been getting into such confusion and uncertainty, that I concluded not to dismiss the complaint then, but let the case come to the general term for more careful examination than is practicable at the circuit. Upon a full examination of all the cases cited by the plaintiff, I have been unable to find any authority for maintaining this action. The cases cited are mostly cases where it has been held that the wife may act as agent for the husband, and where she so acts he is responsible. This is undoubted; but where she acts as agent, and makes an express contract in writing, she can only bind him by such express contract by executing the same in his name, professedly as agent, as in the case of all other agents. (23 *Wend.* 435. 4 *Hill*, 341. 5 *Sand. S. C. R.* 101. 7 *Wend.* 68.) The contract in this case is executed by the wife in her own name. It can only be made out to be the contract of the husband, if at all, by parol proof. Such proof would distinctly contradict or vary the written contract executed by the parties. Parol evidence is inadmissible for such a purpose. (5 *Sand.* 101. 4 *Hill*, 351. 7 *Wend.* 68.) The executory contracts of a married woman are not absolutely void. They are valid in equity, when made upon the credit, or for the benefit, of her separate estate. The execution by Mrs. Hitchcock, in this case, of the contract, bound the land, and

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upon foreclosure and sale of her interest in it, the plaintiff might also have charged any deficiency upon her separate estate, if she had one. The vendor, on making the sale, may have been willing to trust to the security of the land itself for his pay. He retained the legal title till the purchase money was fully paid. Upon the face of this contract that is all he stipulated for, and all he received by way of security for the purchase money. If this land had really belonged to the husband, and the case were reversed, and she had assumed to sell it to Galusha by contract, executed in her own name, by the direction and in the presence of the husband, he would doubtless have been bound in equity by the contract, upon the ground of estoppel or fraud, and adjudged to convey the property or to refund the purchase money, within the case of *Edgerton v. Thomas*, (5 *Seld.* 41;) or if she had purchased personal property for his use, and the same had been received by him and used, he would have been clearly liable for the property, within the cases in 5 *Seld.* 205, and 7 *Howard*, 105, and many others; but in such cases, if she had given a note in her own name, the action would not have lain upon the note, but for the consideration of the note, as for goods sold to the husband. (5 *Seld.* 205. 7 *Wend.* 68. *Glenn v. Younglove*, 27 *Barb.* 480.) The difficulty with the plaintiff's case is, that the contract which he is seeking to enforce was for the purchase of land, which must be in writing, within the statute, and signed by the party to be bound thereby. The contract is not signed by the defendant; it is not his act or deed; and whatever liability he may have incurred relative to this lot of land, if any, is outside of the express contract upon which this action is brought. I think the decision of the special term cannot be sustained, and the judgment there rendered should be reversed.

Judgment reversed.

[MONROE GENERAL TERM, March 7, 1859. *Welles, Smith and Johnson*, Justices.]

BOUGHTON *vs.* OTIS and others.

Under the 12th section of the general manufacturing act, (*Laws of 1848, ch. 40.*) requiring every company incorporated under that act to make and publish a report of its condition, annually, within twenty days from the 1st of January, and providing that "if any of said companies shall fail to make and publish such statement, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made," those trustees who are guilty of the neglect of duty, and those only, are liable to the penalty mentioned in the statute.

For a neglect to make and publish the statement, on the part of the trustees in office on the 1st of January, trustees who are subsequently elected are not liable.

THIS was an appeal from an order made at a special term, overruling a demurrer to the plaintiff's complaint. The complaint stated that on the 1st of January, 1857, the Rochester Novelty Works was a corporation, created under the general manufacturing law, (*Laws of 1848, chap. 40.*) That Boody, Ritter and Huntington were trustees of said company from the 1st of January to some time in March, 1857; that from and after said some time in March, Boody, Otis and Palmer were, and continued to be, trustees thereof until some time in September, 1857; and that the trustees of said Novelty Works did not, within twenty days from the 1st of January, 1857, or at any time since, file and publish the statement or report required by the 12th section of the said act; that said Novelty Works was indebted to the plaintiff for goods sold between the 18th of January, 1856, and the 5th May, 1857, by reason whereof the plaintiff claimed that both sets of trustees were liable for such indebtedness. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

W. F. Cogswell, for the appellant.

H. Humphrey, for the plaintiff.

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By the Court, E. DARWIN SMITH, J. The plaintiff's right of action depends upon the neglect of the trustees of the Rochester Novelty Works, within twenty days from the first of January, 1857, to file and publish the statement or report of its condition, required by the 12th section of the general manufacturing act, (*Laws of 1848, p. 54.*) The statute provides that "if any of said companies shall fail to make and publish such statement, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." This is a penalty imposed for neglect of duty. The penalty consists in depriving the trustees guilty of the fault or neglect of duty of the irresponsibility which pertains to the directors, trustees and stockholders of corporations, and subjecting such trustees to a personal liability for the debts of the corporation then existing. It is a penalty imposed, I think, upon those guilty of the neglect of duty, and those only. It would be unjust to extend it further; and I think such was not the intention of the legislature. The directors or trustees of a corporation making default might well be deemed to elect to incur the responsibility imposed by the statute. They may fitly be punished in the manner provided by the act, by being rendered personally liable for the debts of the corporation. Such trustees are liable for all debts then existing, and for all such as may be thereafter contracted until the proper statement shall be made and published. New trustees coming in, I think, are only liable for their own defaults. It is the failure to make and publish the report within the twenty days next after the first of January of some year, that creates the penalty: that subjects the trustees then in office to personal liability for the debts of the corporation then existing and subsequently contracted. Such trustees may exempt themselves from personal liability for future debts by making such statement after the twenty days, but not for those then existing. For such debts their liability is *fixed* by permitting the twenty days to elapse without making and pub-

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lishing the statement required by the act. This, I think, is the true construction of this provision; and as the defendant Otis was not in default in making such statement within twenty days after the first day of January of any year, he was not liable in this action, and the demurrer to the complaint was well taken.

The judgment of the special term, overruling the demurrer, should be reversed, and judgment be given for the defendant on such demurrer.

Judgment reversed.

[MONROE GENERAL TERM, March 7, 1859. *T. R. Strong, Welles and Smith, Justices.*]

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BAKER vs. SIMMONS.

The verdict of a jury, in a justice's court, should not be set aside simply because the constable having them in charge has sought to interfere with their deliberations, and has urged them to give their verdict to the prevailing party.

THIS was an appeal from the judgment of a county court, reversing a judgment rendered by a justice of the peace. The opinion of the court contains a statement of the facts.

By the Court, MASON, J. The plaintiff in this case recovered a judgment before a justice of the peace for \$91.44 damages and costs of suit, and which, on appeal to the county court, was reversed on error in fact assigned. The judgment was reversed on the sole ground that the constable who had charge of the jury, after they had retired to their room to deliberate on their verdict, urged the jury to give a verdict for the plaintiff. The jury, when they first went out, stood four for the verdict ultimately rendered, and two were for giving a less amount. The jury were out some two hours, and the constable at different times urged them to give a verdict for

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the plaintiff, for the full amount. Some of the jurors told him to be still, and mind his own business; and they all swear that they paid no heed to what the constable said, and that his remarks had no influence upon them, or the verdict which they gave. The simple and only question presented for our adjudication in the case is, whether the court were right in reversing the judgment of the justice for this interference of the constable with the deliberations of the jury. I have looked in vain for a case where the courts in this country, or in England, have set aside the verdict of the jury for such misconduct of the constable. The rule is very strict in regard to the misconduct of a party to the suit, in intermeddling with the jury. The verdict will be set aside for the least intermeddling or improper interference with the jury, or any of them, by a party, during the trial. (13 *Mass. R.* 248. 3 *Brod. & Bing.* 257. 9 *How. Pr. R.* 7.) And so where there has been any misconduct in the jury which created any suspicion of abuse, unless the court can see that such misconduct could not have prejudiced their verdict, the verdict will be set aside. (*Grah. Pr.* 313 to 316, and cases there cited.) But the rule is different where the constable who has charge of the jury has been guilty of official misconduct by talking to them about the case while under his charge, deliberating upon their verdict. The case of *Taylor v. Everett* (2 *How. Pr. R.* 23) is in point. It appears in that case, from the affidavits of several of the jurors, that they were induced to render a verdict which they would not have rendered but for a communication made to them by the constable while they were in their room deliberating upon their verdict; and Judge Jewett refused to set aside the verdict. The same doctrine is held in the case of *The People v. Carnal*, (1 *Parker's Cr. R.* 256.) That case was much stronger than this one at bar. It was a trial for murder, and the constable communicated with the jury, and one of them swore that he never should have convicted the prisoner but for what the constable communicated to them. A new trial was denied in that case, after full argument and ex-

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amination by the court, and the doctrine was affirmed that a communication from the constable to the jury is no cause for disturbing the verdict. While the courts have guarded the verdict of juries, with the greatest caution, from even a suspicion of abuse on the part of the jury that would be likely to prejudice their verdict, and from the least intermeddling or improper interference by a party, no case can be found where they have disturbed a verdict for interference by the constable. And I cannot see any reason, upon principle, for interfering with their verdict, where the jury had no communication with the officer, except to request him to remain silent, but continued to discuss the case among themselves until they came to an agreement, and then returned into court. The constable has no agency in making the verdict; and from the oath which is administered to him in the presence of the jury, they very well understand that the constable has no business to interfere in their deliberations; and they are not likely to heed any thing he may say to them. They would be likely to say to him as the jury did in the case at bar, "Be still, sir." And besides, it would be a practice rendering very insecure the verdict of a jury, if it were liable to be set aside for every such officious intermeddling of strangers to the controversy; for the same principle which would set aside the verdict when the constable wrongfully interfered with the jury, would also invalidate the verdict when any other person did so. I am prepared to affirm the general principle that the verdict of a jury should not be set aside simply because the constable, who has them in charge, has sought to interfere with them and has urged them to give their verdict to the prevailing party.

The judgment of the county court must be reversed, and that of the justice affirmed.

[TOMPKINS GENERAL TERM, October 20, 1857. *Gray, Shankland and Mason, Justices.*]

HATCH & PARTRIDGE *vs.* COLEMAN.

The lien given by the act of April 16, 1852, "for the better security of mechanics and others erecting buildings and furnishing materials therefor," in certain counties enumerated therein, does not extend to a case where, without any express contract on the subject, lumber merchants furnish to a person who is building a house and barn for himself, lumber, which is used by him in the erection of his buildings. SHANKLAND, J. dissented.

Such lien is only given to the material-man when the materials have been delivered in pursuance of a previously existing contract with the owner of the building, or with the contractor for erecting the same.

The act of 1852 has no application to a case where the materials are furnished to a person who is erecting his own building, or altering or repairing the same.

A PPEAL, by the defendant, from a judgment entered at a special term. The material facts appear in the opinion of the court.

MASON, J. This is a proceeding instituted under chapter 384 of the law of 1852, entitled "an act for the better security of mechanics and others erecting buildings and furnishing materials therefor," in certain counties enumerated therein, passed April 16, 1852. (*Laws of 1852, p. 611.*) The judgment recovered by the plaintiffs cannot be sustained, upon the evidence in the case, for the reason that there is no evidence to show that the materials delivered by the plaintiffs to the defendant were furnished by virtue of any contract with the defendant or his agent. All that the evidence in this case shows is that the defendant was building a house and barn, and that the plaintiffs, who are lumber merchants, delivered to the defendant a certain quantity of lumber, which was used by the defendant in the erection of his buildings. The only liability of the defendant, upon the evidence, is one of implied assumpsit. The lien given by this act does not extend to such a case. It is only given to the material-man, when the materials have been delivered in pursuance of a previously existing contract with the owner or with the contractor for erecting such building. This is apparent from the whole scope of the act. The first section only gives the lien to a person who shall, by vir-

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tue of any contract with the owner thereof, or his agent, or a person who, in pursuance of an agreement with any such contractor, shall, in conformity with the terms of said contract, furnish materials in building, altering or repairing any house or other building or appurtenances, &c. The section would seem to limit the lien to a person who shall furnish the materials, while the person furnishing the materials is engaged in putting up the building, or altering or repairing the same; or to a person who shall furnish materials to a contractor for putting up, altering or repairing such building; and such is the plain reading of the section. The act has no application to the case of a person who shall furnish materials to a man who is building his own house, or altering or repairing the same; and it is very clear that the lien is only given where the materials are furnished in pursuance of a previously existing contract. This is most manifest from reading the second, third, fourth and fifth sections of the act. When the person who furnishes the materials is himself putting up, altering or repairing the building, he is not required to furnish any specification, in writing, of the amount of materials furnished, in order to secure his lien. But if the materials are furnished, not to the owner, but to a contractor for putting up, altering or repairing the same, he must furnish to the owner a specification, in writing, of the amount of materials furnished such contractor, together with the prices agreed to be paid therefor; and this specification must be personally served on the owner, or his agent, within twenty days after the materials are furnished, else no lien shall attach to said building. The fourth section shows that the act only embraces cases where the materials have been furnished in pursuance of a contract; as the right given to enforce the lien is limited to materials furnished in pursuance of a contract, and requires the party, if the contract be in writing, to produce the contract to the court, or the best evidence of it in his possession; and it expressly requires him to establish the contract before the court in which he may bring his suit. And the same section de-

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clares that if the contract be not in writing, he shall produce evidence to establish the value of such materials, and that the same has been furnished according to the provisions of the contract made with such owner or his agent. And the fifth section, which gives the right to enforce the lien where the materials have been furnished to a building contractor instead of the owner, expressly limits it to cases where the materials have been furnished in pursuance of a contract.

And there is, in fact, no necessity that the lien should be extended beyond this; for where the materials are furnished either to the owner or building contractor, without any existing contract, he may require payment as he furnishes them. He is under no obligation to furnish any, only as he receives his pay as he goes along. And in the case at bar, as the plaintiffs were under no obligation to furnish these materials to the defendant, they might have required payment from the defendant for each load of the lumber as the same was delivered. There is no binding contract in the case. The defendant was erecting his own building, and the plaintiff was under no obligation to furnish him with any materials. And the plaintiff cannot enforce the lien which he claims, for two reasons: in the first place the materials were not furnished in pursuance of any contract; and in the second place the act has no application to a case where the materials are furnished to a man who is erecting his own building, or altering or repairing the same. It will not do to imply a previously existing contract, from the fact that the materials are furnished. It is true the law will raise an implied assumpsit to pay, but it will not go so far as to raise the presumption that they were furnished in pursuance of a previously existing contract to furnish them; and the fourth section of the act shows most clearly that such was not the intent of the act, as it limits the right to enforce the lien to cases where the materials are furnished in pursuance of a contract, and requires the contract to be produced or established by the best evidence in the possession of the party; and if not in writing, it requires the contract

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to be established by evidence, and that it be shown the materials were furnished in pursuance of it. The amendment of 1853, chapter 413, (*Laws of 1853, p. 809,*) is equally explicit to show that the scope of the act is limited to this extent. The amendment reads as follows: "Any person who, in pursuance of an agreement with such contractor, shall, in conformity with the terms of said contract, furnish any materials, may serve a specification," &c. The judgment must be reversed, and a new trial granted, costs to abide the event; as the plaintiffs may, perhaps, establish a contract, upon a re-trial.

GRAY, J. concurred.

SHANKLAND, J. dissented.

Judgment reversed.

[TOMPKINS GENERAL TERM, October 20, 1857. *Gray, Shankland and Mason, Justices.*]

WENDELL vs. THE CITY OF BROOKLYN.

The common council of the city of Brooklyn has authority, under the city charter, to add to the duties of the health officer of the city, as prescribed in the charter, the duty of inspecting, and granting certificates to police officers and candidates for the place of police officer, of their physical fitness for the duties imposed upon them.

The common council has no power to pay the health officer for specific services, while he is receiving an annual salary from the corporation, as health officer; and if it sees fit to add to the duties of the office, by requiring from him the performance of a specified service, no implied assumpsit to pay him therefor can arise.

THIS was an appeal from a judgment of the city court of Brooklyn. In 1853 the plaintiff was health officer of the city of Brooklyn. On the 21st of January, 1853, the common council passed the following resolution:

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“Resolved, That the policemen of the city of Brooklyn, already appointed, as well as those to be hereafter appointed, be ordered to appear individually before the officer of health for inspection; and that each policeman shall present to the mayor, before March the first next, a certificate from the aforesaid officer, setting forth his physical qualifications for a proper discharge of his duties.”

Pursuant to this resolution, 146 policemen presented themselves to the plaintiff, and were examined by him, for which services he charged the defendants \$2 for each examination. The plaintiff, as health officer, received a fixed salary of \$500, which was regularly paid to him. Upon these facts appearing, the defendants moved that the complaint be dismissed. The court denied the motion, and the defendants excepted. The court charged the jury that the plaintiff was entitled to recover a fair compensation for his services; to which the defendants excepted. The jury found a verdict for the plaintiff for \$292 and costs; and from the judgment entered thereon the defendants appealed.

S. E. Johnson, for the defendants.

C. J. Jack, for the plaintiff.

By the Court, BROWN, J. The plaintiff is the health officer of the city of Brooklyn, and the action is brought to recover compensation for services rendered in the examination of 146 policemen, and granting them certificates of physical capacity for their position.

The resolution of the common council of the 21st January, 1853, directed the policemen already appointed, as well as those to be thereafter appointed, to appear individually before the health officer for inspection; and further directed that each policeman should present to the mayor, before the first of March thereafter, a certificate from such officer setting forth his physical qualifications for a proper discharge of his

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duties. This resolution contains all that was offered on the trial to show the plaintiff's retainer to perform the service for which he claims compensation. And in my judgment it resembles much more an order upon the policemen to show and make out their physical ability to hold their several offices, than an employment of the plaintiff to perform this particular service for the city. The direction is not to the health officer to make the examination, but to the policemen to go to him and procure his certificate, as the condition upon which those already appointed were to retain their places, and those not appointed were to be taken into the public service. It seems to me, if the plaintiff can make any valid claim for the services, his claim is rather against the persons obtaining his certificate than against the city.

At the time the services were rendered, the plaintiff was the health officer of the city of Brooklyn, at a fixed salary of \$500 a year, which he says has been regularly paid. The resolution refers to him in his official character as health officer, and not to him in his private professional character. It is evident that the common council, if they can be regarded as employing him at all, intended to avail themselves of his public official services. These they had a right to, as will be seen by reference to the provisions of their charter. The health officer is one of the public functionaries of the city, and some of his duties are prescribed by section 10 of the 9th title of the act of the 14th April, 1850, to amend and revise the several acts relating to the city of Brooklyn. Subdivision 32 of section 13 of title 2 gives the common council power to define and limit the duties which are by the act required to be performed by the several officers of the city, and to prescribe such other or further duties to be performed by them, or any of them, as it may deem proper. The common council, therefore, had express authority to add to the duties of the health officer, as prescribed in the act, the duty of inspecting and granting certificates to police officers and candidates for the place of police officer, of their physical fitness

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for the duties imposed upon them. And if the common council saw fit thus to add to the duties of the health officer, it by no means undertook to compensate him specifically for such additional duties. But the common council are not authorized to pay the health officer for specific services. Section 27 of title 3 seems to have been framed with a view to prevent any thing of the kind. It declares that "the common council shall grant and pay to the mayor, comptroller, street commissioner, chief of police, collector of taxes, attorney and counsellor, treasurer, and all other officers, assessors, commissioners, clerks, and other subordinates, elected or appointed under or in pursuance of this act, (except aldermen,) such stated salaries as it may from time to time deem proper, or shall be fixed by this act; but such salaries shall be instead of all fees and perquisites for services to be performed by such officers;" with the further provision, that such salaries shall neither be increased nor diminished during the continuance of the term for which the incumbent is elected. This provision for a fixed salary, to continue during the term, implies that the officers shall not be compensated in any other form. If the health officer may take his salary and claim compensation for specific services, upon the ground that they are special and extraordinary, who shall fix the line of separation at which the services cease to be ordinary and usual, and become unusual and extraordinary? If the health officer, who is a salaried officer of the city, can make a valid claim to compensation for making the examination of the policemen, why may not the policemen have an equally valid claim for submitting to the examination? They, too, are salaried officers, and, like the health officer, are within the meaning of section 27, to which I have referred. When the common council referred it to the health officer to inspect these policemen, it became a part of his general duties as such health officer, which, under the 32d subdivision of section 13, to which I have also referred, it had a right to impose upon him; and no implied assumpsit

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can arise upon the resolution, which is the foundation of the plaintiff's action.

The judgment of the city court should be reversed, and a new trial ordered, with costs to abide the event.

[DUTCHESS GENERAL TERM, May 9, 1859. *Brown, Emott and Lott*, Justices.]

THE PEOPLE, *ex rel.* Sarah Kearney, *vs.* JOSEPH CARTER.

A party in the peaceable and actual possession of lands, at the time of a forcible entry, is entitled to proceed under the statute relating to forcible entries and detainers, although he is neither seised of a freehold nor possessed of a term for years in the premises.

The office of justice of the peace is not a town but a county office, and therefore is not within the letter of the 15th section of the 11th title of the act of April 17, 1854, to consolidate the cities of Brooklyn and Williamsburgh and the town of Bushwick, which provides that the terms of office of the city and town officers elected or appointed for the cities of Brooklyn and Williamsburgh and the town of Bushwick shall expire on the first day of January, 1855.

Where H., a justice of the peace of the city of Brooklyn prior to the consolidation, continued in his office of justice until after the consolidation took effect, and then resigned, and the governor of the state issued a commission to J., dated January 9, 1856, appointing him a justice of the peace for the city of Brooklyn, in the place of H. resigned; *Held* that the appointment was invalid.

Held also, that the governor having no power to fill the vacancy, he could not bestow upon J. the outward signs and symbols of the office, and J. could not therefore be said to be in by color of title, so as to make his acts legal, and his warrant a protection to persons executing it.

THIS is a proceeding under title 10, chapter 8, part 3, article 1 of the revised statutes, entitled "Summary proceedings to recover the possession of lands in certain cases." Commenced originally before the county judge of Kings county, it was, upon the finding of an inquisition against the defendant, removed into this court by a writ of certiorari. The defendant traversed the inquisition, and the issue thus joined was brought

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on for trial on the 8th of November, 1858. A verdict of guilty, against the defendant, was entered by the direction of the court, who directed a case to be made, and the motion for a new trial to be heard, in the first instance, at the general term.

N. F. Waring, for the relator.

L. Bennett, for the defendant.

By the Court, BROWN, J. The evidence in this action showed that the relator, on the 21st day of October, 1856, was in the peaceable possession of a house and lot of ground at the foot of Middah street, fronting on Freeman street, in the city of Brooklyn, which was held under a lease from the defendant to the relator and her husband William Kearney, deceased, dated May 2, 1853, for the term of three years and four months from the 1st day of May, 1853. On the 21st of October, 1856, she was forcibly dispossessed and turned out of the premises by the defendant and those acting under his orders, by virtue of a warrant issued by Enoch Jacobs, who claimed to be a justice of the peace in and for the city of Brooklyn, under the act entitled "Summary proceedings to recover the possession of lands, in certain cases." The relator's term for years, and her estate in the lands, was ended at the time of the entry; for the three years and four months mentioned in the lease to her and her husband had elapsed. In *The People, ex relatione Gault, v. Van Nostrand*, (9 *Wend.* 50,) it was held that a party in the peaceable and actual possession of lands at the time of the forcible entry, or in the constructive possession thereof at the time of a forcible holding out, is entitled to proceed under the statute of forcible entries and detainers, although he is neither seised of a freehold nor possessed of a term for years in the premises. And also that proof of actual possession is sufficient to support the allegation in the inquiry that the complainant was possessed in fee simple. The court, in the opinion, say that the new provisions recently in-

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troduced into the revised statutes bring back the statute of forcible entry and detainer, among the most valuable of our remedial statutes, to the original intent and purpose for which the numerous English acts, of which our old statute was a copy, were passed; to wit, to prevent individuals from doing themselves right by force, and to protect persons in the peaceable occupation of lands from a forcible dispossession without the authority of law. This authority disposes of one of the principal questions in the cause, and leaves the justification of the defendant dependent upon the authority of Enoch Jacobs to entertain the summary proceedings and issue the warrant for the removal of the relator.

The predecessor of Enoch Jacobs in the office of justice of the peace was one James Hall, who was duly elected a justice of the peace in the town of Bushwick while it was one of the civil divisions of the county of Kings. When Hall was elected, and for what term of time, does not appear; nor is it at all material to the present inquiry. By the act to consolidate the cities of Brooklyn and Williamsburgh and the town of Bushwick into one municipal government and to incorporate the same, passed April 17th, 1854, the last named town ceased to exist as a civil division, and became thenceforth a part of the consolidated city of Brooklyn. The 13th section of the 11th title of the act provides that the terms of office of the city and town officers elected or appointed for the present cities of Brooklyn and Williamsburgh and the town of Bushwick, shall expire on the first day of January succeeding the passage of the act, with certain exceptions which do not include the office of justice of the peace. I am inclined to adopt the reasoning of the dissenting opinion in *The People v. Keeler*, (17 *New York Rep.* 370,) that the office of justice of the peace is not a town but a county office, and therefore is not within the letter of the 15th section of the consolidating act to which I have referred. I do not see, however, that this consideration will be of any avail to the defendant, because James Hall, the predecessor of Jacobs, continued in his office of justice until

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after the consolidation took effect, and then resigned. Enoch Jacobs thus received a commission from the governor of the state, dated the 9th day of January, 1856, appointing him a justice of the peace for the city of Brooklyn, in the place of James Hall who had resigned. I am unable to find any authority given to the governor to supply vacancies in this office in the city of Brooklyn. By the act to establish courts of civil and criminal jurisdiction in the city of Brooklyn, passed March 24, 1849, the city is to be divided into two or more districts, in each of which a justice of the peace shall be elected for the term of four years from the 1st of May. Vacancies may be filled by the common council until the next charter election after they occur, when they are to be filled for the residue of the unexpired term. (§§ 35, 37.) The governor, it would seem, was without any power to fill the vacancy occasioned by the resignation of James Hall. (*See The People v. Keeler, supra.*)

The counsel for the defendant insists, however, that in any aspect of the case, the acts of Enoch Jacobs are legal and effectual to protect the defendant, because he was a justice of the peace *de facto*, and in a collateral inquiry his title cannot be questioned and examined. It is doubtless true that the acts of a public officer *de facto*, or one who is exercising its duties under the forms of law and color of title, are valid, and not open to question or inquiry in a collateral proceeding. He must first be ousted by a direct proceeding, in the nature of a *quo warranto*. To entitle his acts to this immunity, however, he must be the incumbent under color of title. For instance, an elective officer may have the official certificate of the canvassers, while another may have had a majority of the votes and be really entitled to the office. In the former case the officer has all the outward forms of title, and is said to be in by color of title. His acts are valid and binding until he is ousted and the office awarded to another. In the present instance, if the governor had no power to fill the vacancy, he could not bestow upon Jacobs the outward signs and symbols

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of the office. He could not therefore be said to be in by color of title. In the case of an elective office the certificate of the canvassing board is the evidence of the title, and can only be overthrown by a regular proceeding for that purpose. But the certificate of the governor, when he is without power of authority, is evidence of nothing whatever.

I think, therefore, that the defendant is without justification, and that judgment must be entered for the relator. The statute is peremptory that when the defendant is found guilty the court shall award restitution, with costs.

[DUTCHESS GENERAL TERM, May 9, 1859. *Lott, Brown and Emott*, Justices.]

J. WARREN TOMPKINS vs. COLUMBUS W. SEELY and wife,
SETH WHITNEY and others.

Time is of the essence of an agreement for the sale and purchase of real estate ; and if the execution of the contract is suspended for ten years, without any fault on the part of the purchaser, he will not be compelled to fulfill it. On the 8th of December, 1847, S. entered into an agreement with H. for the purchase of lands ; the time appointed for the payment of the purchase money and the delivery of the deed being the 1st of April, 1848. H. died in March, 1848, leaving infant heirs, and leaving the contract unexecuted. S. entered into possession of the property, and made improvements thereon. And he, after the death of H., united with H.'s administrator in an application to the court for its aid to carry the contract into effect, and deposited with a trust company the sum of \$1500, on account of the purchase money, to be paid over whenever a conveyance of the property should be effected. This sum was subsequently paid over to the administrator of H., under an order of the court. *Held*, that S. had exhibited substantial evidence of his willingness and readiness to perform his part of the agreement ; and no valid deed having been tendered by the heirs of H. within ten years from the date of the contract ; *Held further*, that even if the heirs were now capable of performing the stipulations of the agreement, S. and those claiming under him, were entitled to be relieved from its obligations, after such a lapse of time, and to have whatever they had paid, on account of it, refunded to them.

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Held also, that S. had an equitable right to look to the property for the reimbursement of the \$1500 paid over to the heirs of H., if such heirs failed or were incapable of performing the agreement of sale within a reasonable time; and that he had an equitable lien upon the land, to that extent.

Held further, that an assignee of S.'s interest in the contract succeeded to all the rights in the contract, and to the money paid under it, that S. possessed. And that when such lands were about to be sold, under a prior mortgage, such assignee had such an interest in the subject as entitled him to pay the amount due upon the judgment of foreclosure, and to be subrogated to all the rights of the mortgagee.

APPEAL from a judgment entered at a special term. The action was brought to recover back moneys paid by the plaintiff, as assignee of the purchaser, in part performance of a contract for the sale and purchase of land. The cause was tried, at the circuit, before Justice LOTT, who directed a judgment to be entered setting aside the contract; and directing a sale of the premises, and that out of the proceeds the plaintiff be paid, 1. The costs and allowance in this suit, and the expenses of the sale. 2. The amount due on the Whitney judgment, on the 21st of June, 1851. 3. In case there should be a surplus, that the sheriff pay to the plaintiff the sum of \$1500 deposited in the trust company, with interest from April 6th, 1848, after deducting amount due for rent, or use and occupation of the premises, by the plaintiff or his assignor. The defendants appealed from the judgment.

J. W. Tompkins, in person.

S. E. Lyon, for the defendants.

By the Court, BROWN, J. The plaintiff prosecutes this action as the assignee of the defendant Columbus W. Seely, and its object is to recover back certain moneys paid by Seely in part performance of an agreement for the purchase of certain lands in Yorktown, Westchester county, made with Joseph R. Hyatt, the ancestor of some of the defendants, and also to recover moneys paid by J. Warren Tompkins,

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the present plaintiff, in satisfaction of a mortgage lien held by the defendant Seth Whitney upon the same premises. The contract bears date on the 8th December, 1847; and the time appointed for the payment of the purchase money and the delivery of the deed of conveyance, was the first day of April thereafter. Joseph R. Hyatt, however, died on the 24th of March thereafter, leaving a number of children, who are made defendants in this action, some of whom were infants, and leaving the contract unexecuted. Seely was to pay \$5000 for the premises; three thousand dollars on the first day of April, upon the delivery of the deed, and assume the payment of Seth Whitney's mortgage upon the premises, for \$2000. He was then to be entitled to a deed from Joseph R. Hyatt, good and sufficient for conveying and assuring to him the premises purchased, with the tenements, hereditaments and appurtenances, and all the buildings and erections thereon, whether affixed to the soil or not, or in part upon the turnpike in front of the premises or not. The deed was to contain full covenants, subject only to the incumbrance of Whitney's mortgage for \$2000. These were Seely's rights under the contract—rights of which he could not be divested or deprived, and which could not be impaired, except by his own act, and by his own consent. It remains to be seen by what means, and in what forms and process of law, these rights were claimed to be satisfied.

George E. L. Hyatt, one of the defendants, took out letters of administration upon the estate of Joseph R. Hyatt, deceased, and presented his petition to the supreme court for the specific performance of the intestate's agreement with Seely, pursuant to the statute. The counsel for the defendants, in their written statement of facts furnished to the court, assert that these proceedings were regular, and that on the 6th of June, 1848, a final order was made therein, authorizing a conveyance of the land, according to the terms of the agreement. I read them in a very different light. I think they are marked by a very indifferent appreciation—I may

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say a misapprehension—of Seely's rights under the contract ; for the order of the 6th June wholly omitted to provide for a conveyance of the interest of two of the infant heirs, and was silent as to the form and the covenants of the deed. The agreement contained a peculiar and expressive provision in regard to the erections upon the premises to be conveyed, and the proof in this action disclosed the fact that the water supplied to the premises was conducted in pipes from the lands of an adjoining owner, and to which the vendor had no other title but a mere license. It would have been wise, therefore, in the order of reference made in the proceeding, to have directed the referee to inquire whether the contract was capable of execution by the heirs at law of the vendor. Nothing of the kind, however, seems to have occurred to those who conducted the proceedings. Seely's disposition to have the contract carried into effect, and to perform it on his part, is manifested by his assent indorsed upon the petition that the order prayed for be granted ; but it certainly is a subject of regret that the counsel for the petitioner, George E. L. Hyatt, upon the motion to confirm the referee's report, and for the order of the 6th June, 1848, was also the counsel for Columbus W. Seely upon the same motion ; for to this circumstance may probably be attributed the want of that critical examination of the provisions of the order, which would have detected the omissions that rendered it defective, and of no practical value, in the judgment of the court of appeals. It is another proof of the inaccurate and imperfect character of these proceedings, that the deed of the 8th June, executed by virtue of the order of the 6th of June, 1848, conveys, or professes to convey, the interests of the infant heirs, Pamela Hyatt and Joseph E. Hyatt, whose names are omitted in the order. This deed, as the court of appeals afterwards decided, Seely was not bound to accept, and he refused to accept it, as a performance of the contract. In a subsequent application to the special term of this court, Seely was told that he was not at liberty to impeach the order of the 6th of June. That

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all the questions in regard to the performance of the contract had been settled, save that in regard to the form of the deed. That he was entitled to a deed with covenants which should bind the heirs to the same extent as if such covenants had been made by the intestate in his lifetime. And that upon tendering a deed with such covenants, an attachment should issue against him unless he accepted it in performance of the contract. Another deed of the date of the first of November, 1848, was prepared and tendered to Seely, in pursuance of this direction, and it is remarkable for its entire disregard of precedents, of legal principles, as well as of the directions of the judge at the special term. It is executed by the infant heirs in person, as well those named in the order of the 6th June, as those whose names are omitted in the order. It contains a covenant of seisin and for quiet enjoyment, a covenant for further assurance and a covenant of warranty jointly by all the grantors, adults as well as infants, not limited in the extent of the liability of the covenantors to the assets received or inherited from the ancestor, but unqualified and unlimited except by the qualifications and limitations which the law puts upon all similar covenants. This deed was also tendered and refused; and when it came before the court of appeals, upon an appeal from the orders which directed Seely to receive it and pay over the balance of the purchase money in performance of the contract, or that an attachment issue against him, that court held that there was no order authorizing a conveyance of the shares of the infants, Pamela and Joseph E. Hyatt, and that their share of the lands would not pass under the deed. That the guardian had no authority or power to insert covenants in the deed to bind the infants. That it was imperfectly and illegally executed, and Seely was not under any obligation to accept it in execution of the contract. The court reversed the orders appealed from, leaving the order of the 6th June, 1848, in force, as far as it could have any legal force, but with the explicit and emphatic expression of opinion that it did not authorize the execution and deliv-

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ery of a deed which Seely was bound to accept in performance of the contract, and which would vest in him the title to the property therein mentioned. (*See Hyatt v. Seely*, 1 *Kernan*, 52.)

The impediments found in the way of a specific performance of the agreement have certainly not been placed there by Seely. If there are errors in the proceedings taken in this court to effect that object, they are not his errors, and he is in no wise responsible for their consequences. He entered into the possession of the property in good faith. He made improvements upon it. He united with the administrator of Joseph R. Hyatt in an application to this court for its aid to carry the contract into effect. He deposited, under a stipulation with the administrator, in the New York Life Insurance Company, the sum of fifteen hundred dollars, on account of the purchase money, to be paid over whenever a conveyance of the estate was effected. And this money was, by the order of the special term, taken from the hands of the depository and paid over to the administrator. He has thus exhibited substantial evidence of his willingness and readiness to perform his part of the agreement. If the heirs at law of the deceased Joseph R. Hyatt were capable now of performing the stipulations of the agreement, I should, notwithstanding, think Seely, and the plaintiff claiming under him, should be relieved from its obligations, after this lapse of time, and whatever they have paid on account of it should be repaid to them. Time is certainly of the essence of such an agreement; and if its execution is suspended for ten years, without fault on the part of the purchaser, it would be inequitable and unjust to require him to fulfill it now.

Under the deed of assignment the plaintiff has all the rights to the contract, and to the money paid under it, that Seely had. Seely had an undoubted equitable right to look to the property in question for the reimbursement of the \$1500, and the interest, delivered over to the administrator under the order of the court, if the heirs at law of Joseph R. Hyatt failed, or were incapable of performing the agreement

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of sale within a reasonable time. He had an equitable lien upon the lands to that extent. And when the lands were about to be sold under Whitney's mortgage, the plaintiff, who had succeeded to Seely's rights, had such an interest in the subject as entitled him to pay the amount due upon the judgment of foreclosure, and to be subrogated to all the rights of Whitney, the mortgagee. It is not a good argument against this conclusion to say that Seely was bound to pay the amount due to Whitney as a part of the purchase money. And as the plaintiff succeeded to Seely's liabilities as well as his rights, in paying off the mortgage he was doing no more than he was bound to do. The delivery of the deed of conveyance, the payment of the purchase money, and the assuming to pay Whitney's mortgage, were concurrent acts, to be done at one and the same time. The obligation of Columbus W. Seely to pay, or to take upon himself to pay, Whitney's mortgage was not perfect until Joseph R. Hyatt, or those who succeeded to his rights, were in a condition and ready to execute the deed of conveyance in conformity with the terms of the contract.

I think the judgment should be affirmed, with costs of the appeal.

[DUTCHESS GENERAL TERM, May 9, 1859. *Lott, Emott and Brown*, Justices.]

 CONKLIN vs. THOMPSON.

In an action *ex delicto*, for an injury to the plaintiff's property occasioned by the wrongful act of the defendant, the infancy of the defendant is no protection. He is as fully liable for the damages sustained as if he were of full age.

The act of exploding fire crackers, in the public streets of a city, is wrongful and unlawful; and if any injury to the persons of individuals, or to property animate or inanimate, results therefrom, the wrongdoer is liable to compensate the sufferer.

Where an action is brought to recover the value of a horse, which the plaintiff

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claims died of sudden fright, caused by the explosion of a fire cracker thrown under him by the defendant; while the defendant insists that the death of the horse resulted from over-driving, in warm weather; and there is evidence in support of each theory, it is the province of the jury to decide the question in regard to the cause of the animal's death; and they having found a verdict in favor of the plaintiff, the court will not interfere with it.

THIS action was commenced in a justice's court, of Dutchess county. The complaint alleged that on the 4th July, 1857, the plaintiff was peaceably and lawfully driving a horse of the plaintiff, attached to a wagon, through the streets of Poughkeepsie; and while so driving through said streets, the defendant designedly and intentionally and willfully threw a lighted fire cracker under the plaintiff's horse, which exploded under the said horse, and so frightened him by said explosion that in consequence thereof he died immediately; and the plaintiff averred that the noise caused by the explosion of said fire cracker so frightened said horse as to produce his death; that said horse was worth \$100; and the plaintiff claimed damages to that amount.

The defendant, by his answer, denied each and every allegation in the complaint, and averred that the plaintiff caused the death of his horse by severe and continuous driving on said 4th of July. That the plaintiff caused the death of his horse by forcing him through the streets of the city of Poughkeepsie on a day when he knew that by law and by custom, cannons, guns and crackers were fired and exploded in the streets of said city, well knowing that his said horse was liable to take fright from such noise. That said horse was old and diseased, and that his death was produced by being overheated by too great driving. The material portions of the testimony are referred to in the opinion of the court. The defendant was an infant, about 14 years of age, at the time of the occurrence. The jury found a verdict in favor of the plaintiff for \$60 damages, and the justice entered judgment for that sum, with costs; which the county court, on appeal,

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reversed. And from the judgment of the county court the plaintiff appealed to this court.

W. S. Eno, for the plaintiff.

I. F. Barnard, for the defendant.

By the Court, BROWN, J. This is an action *ex delicto*, for exploding a fire cracker under the horse of the plaintiff while traveling upon one of the public streets in the city of Poughkeepsie, whereby the horse became frightened and fell down and died. If the death of the horse resulted from the wrongful act of the defendant, infancy is no protection. He is as fully liable for the damages as if he had been of full age.

Nor can there be any doubt that the act of the defendant was wrongful and unlawful. The plaintiff was in the rightful use and enjoyment of the public highway, passing from his own home in the town of Stamford to the city of Poughkeepsie, upon business or pleasure, or both. The road was created for these uses, almost solely; and the plaintiff and all others had the right to pass over it without interruption or annoyance of any kind. The streets of a city, and highways every where, are not unfrequently appropriated to the uses of exploding fire crackers and similar contrivances. Such acts are nevertheless wrongful. They are tolerated and not authorized, and those engaged in committing them assume the responsibility of all the bad consequences which ensue. Any injury to the persons of individuals, any injury to property animate or inanimate, which result thereby, create a liability on the part of the wrongdoer to compensate the sufferer.

The question whether the defendant was requested by the plaintiff not to explode the cracker before the horse began to reel and fall, was much disputed at the trial. The evidence was quite contradictory. It was not important, however, in any view. If the act was done after the defendant was requested to desist, it would undoubtedly show that the boy was thought-

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less and reckless of the consequences of his acts, but it could not affect the principal question. If the death of the plaintiff's horse was the result of what he did he was liable to an action, whether he was requested to desist or not.

The real question litigated at the time was upon the cause of the death of the horse. The proof showed that the defendant threw the lighted cracker under the horse, where it exploded; that the horse appeared much frightened, sheared towards the sidewalk, reeled and fell, and almost immediately expired. He was proved to have been, up to that time, in good health, was 18 years of age, and had traveled from Stamford, a distance of twenty-two miles, in five hours, the morning he died, which was the 4th of July, and which was a cool day for the season of the year. Some of the witnesses thought he died from apoplexy, and some from fright or fear. Benjamin S. Wilber, a physician of forty years' practice, said that sudden fright often results in death—immediate death. Fright, he says, sometimes produces apoplexy. Robert Jackson, a horse farrier of twenty-five years' standing, thought the horse died of apoplexy caused by over-driving, and he thought that fright or fear would not result in apoplexy, but would produce what he calls palpitation. The theory of the plaintiff upon the trial was, that the horse died of sudden fright caused by the fire and explosion of the cracker; while the theory of the defendant was, that his death resulted from over-driving in warm weather. No over-driving seems to have been proved; and it did appear that up the time of the explosion the horse appeared in good health, and then became excessively frightened, staggered, reeled, fell down and died. Whose province (it may be asked) was it to determine between the theory of the plaintiff and that of the defendant in regard to the death of the animal? It was an issue involved in some doubt, certainly; and there was evidence upon both sides, and in favor of both views of the accident. Was it the province of the court, or that of the jury, to decide? It was a single naked question of fact, unmingled and unembarrassed

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by any legal considerations. Its determination, therefore, according to the theory of our law, and the frame of our judicial tribunals, belonged exclusively either to the court or the jury; and I am not mistaken when I think that to the latter alone belonged the decision of the question; for I think it would be difficult to frame an issue and offer evidence to prove and disprove it, on either side, which would be more exclusively within the province of a jury than this was. The jury empaneled to try the action found in favor of the plaintiff, and there, I think, the litigation should have ended. Neither this court nor the county court can, I think, interfere with such an adjudication.

The judgment of the county court should be reversed, and that of the justice's court affirmed.

[DUTCHESS GENERAL TERM, May 9, 1859. *Lott, Emott and Brown, Justices.*]

RICHARDSON and others, executors, &c. vs. JANE SHARPE.

Where a power is given to executors to sell and convey real estate, and they fail to exercise the power within the period limited by the will, they cannot execute the power afterwards, so as to give a good title to a purchaser.

If the will contains an express and direct provision that the executors are to sell the real estate within seven years from the time of the testator's death, this implies that they are not to sell after that time.

CONTROVERSY submitted by the parties, for the opinion and judgment of the court, pursuant to the provisions of the code, upon a statement of facts agreed upon.

J. T. Mills, for the plaintiffs.

C. J. Lowrey, for the defendant.

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By the Court, BROWN, J. The only question involved in this action is upon the power of the plaintiffs, who are the executors of Simon Richardson, deceased, to sell and convey the real estate of which he died seised, after the lapse of the period appointed by the will for the execution of the power. The testator died on the 28th day of October, 1850, and his executors offered certain of the lands whereof he died seised, for sale at auction on the 27th day of January, 1858, which were struck off to the defendant for the sum of \$40.50, as the purchaser thereof. Upon examining the title she refused to execute the contract to purchase, upon the ground that the plaintiffs, the executors, had no power to sell and convey.

I accept the authoritative declaration of the late chancellor, in *Egerton's Administrators v. Conklin*, (25 Wend. 224,) as a true exposition of the law, wherein he says, "The time when a power in trust for the sale of the testator's real estate can legally and properly be executed must, like every other disposition of property by will, depend upon the intention of the testator, to be ascertained upon an examination of every thing contained within the four corners of the will, and with reference to the objects the testator had in contemplation by the execution of the power." It will be well, therefore, to look at the provisions of the testator's will, the objects of his bounty, and the purposes he sought to accomplish thereby. First, he gave to his wife Ann the one-third part of his personal estate, after the payment of debts and funeral expenses. Next, he gave \$2000 to his granddaughter, Emma Louisa Richardson, to be paid three years after his decease, provided she attained the age of 21 years, or have lawful issue before that age. Otherwise the bequest to be void. He then gave one-sixth to each of his five children, William, Stephen, Grace, Amanda and Clementine, to be paid to each of them, respectively, at 21 years of age, and upon their decease before attaining that age, leaving lawful issue, then to such issue. He also gave the remaining one-sixth part, with the interest that might accrue thereon, to his executors, in trust, to pay

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and distribute the same to each of the children of his deceased daughter Sarah Ann, upon their attaining the age of 21 years; and upon the death of either of them before or after the death of the testator under twenty-one, and leaving lawful issue, then to such issue, share and share alike. And in case any of the said children should die after the death of the testator, and before attaining the age of twenty-one years, and without lawful issue, then the share of the person so dying to be distributed equally amongst his or her surviving brothers and sisters. Excepting the right of the mother to share in the portions given to the children of his daughter Sarah Ann dying under age and without issue, and excepting also the time of payment to all the distributees, the distribution of the personal estate is substantially the same as would have taken place under the statute of distributions had Simon Richardson died intestate.

With the exception of the trust to receive and pay over the rents, issues and profits, and the trust to sell within a limited period, and depriving the mother of the right to inherit as heir at law of her children dying under 21 and without issue, the disposition which the will makes of the real estate of the testator is substantially the disposition which would have been made by the statute of descents. First, there is a devise of all his real estate to his executors, and to the survivors and survivor of them, upon trust, to receive the rents and profits, and after paying expenses &c., to pay one-third part thereof to his wife during life, the one sixth part of the remaining two-third parts to each of his five children, William, Stephen, Grace, Amanda and Clementine; and the remaining one-sixth of two thirds to the children of his deceased daughter Sarah Ann, in the same manner and proportions as the executors were before required to pay the one-sixth part of the residue of his personal estate. "And in further trust, that the executors, or the survivor or survivors of them, shall and do, within the term of seven years from the date of my decease, and from time to time, and at such times and in such

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lots, pieces and parcels, and at public auction or private sale, &c., grant, bargain and sell all my real estate," &c. One third part of the purchase money is to be left upon the premises sold, or invested at interest during the lifetime of his wife, and the interest thereof paid to her once in every six months during her natural life. After paying all costs and charges and commissions, the residue is to be paid out and distributed, one equal sixth part to each of his children, William, Stephen, Grace, Amanda and Clementine, and the remaining sixth part thereof to the children of his daughter Sarah Ann, in the same manner as the will directs in regard to the remaining sixth part of his personal estate bequeathed to his executors in trust. He also declares that the provision in favor of his wife shall be in full satisfaction of her dower. And it appears she died on the 27th January, 1856.

We do not know from the case the ages of the five children who are the principal beneficiaries under the will, nor when they attained or would attain their majority; nor are we informed of the age of his wife, at the time the will was made, nor the probable duration of her life. If the testator's object in creating this trust, coupled with the power of sale, was to enable his executors to make a more adequate provision for the support of his wife, by converting the real into personal estate, yielding an interest, if it became necessary; or if the five children who take five sixths of the estate would attain the age of twenty-one within the space of seven years from the time of the testator's decease, then we should be furnished with what may have been a very sufficient reason to the testator for putting a limitation of time upon the exercise of the power to sell. One thing is quite clear: the limitation is express and direct that they are to sell within seven years from the time of the testator's death; and this implies that they are not to sell after that time. There is no reason why his will, in this respect, should not be observed as well as in every other; for it will not be doubted that he had the power to limit and prescribe the time within which the sale should

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be made, as he had to limit and appoint the person or persons who were to make it. The words, "within the term of seven years from the date of my decease," doubtless were intended to signify some purpose and intention of the testator; and that intention can be no other than that the power of sale, if exercised at all, must be executed within the period of time written in the will. "If the conditions annexed to a power be merely nominal, and evince no intention of actual benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded in the execution of the power. In all other respects the intention of the grantor of a power as to the mode, time and conditions of its execution, shall be observed, subject to the power of the court of chancery to supply defective executions." (4 *Kent's Com.* 333.)

The plaintiffs having failed to execute the power to sell during the time given to them for that purpose in the will, I think they are not in a condition to make and execute a sufficient conveyance to assure the title to the defendant, and she is entitled to have judgment in her favor, with costs, according to section 372 of the code.

[DUTCHESS GENERAL TERM, May 9, 1859. *Lott, Emott and Brown*, Justices.]

SHELDON vs. THE HUDSON RIVER RAIL ROAD COMPANY.

In an action against a rail road company, to recover damages for the destruction of the plaintiff's building by fire, through the negligence of the defendant, the plaintiff must show that the act or omission causing the loss was the act of the defendant; and that such act or omission was a negligent one. What facts are necessary to be proved to establish the charge of negligence, in such a case.

It is not enough for the plaintiff to show a possibility that the fire was communicated to the building by sparks from the defendant's locomotive.

The plaintiff cannot recover upon a possibility; nor even upon a probability.

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To justify a verdict, the law requires such proof as will leave no reasonable doubt of the existence of the fact upon which it must rest.

It is amongst the primary and most important duties of the court to order a nonsuit, or to grant a new trial, whenever the evidence is not sufficient to authorize or sustain a verdict. *Per BROWN, J.*

When there is proof which, uncontradicted, makes out the fact upon which the recovery depends, on the one side, and there is testimony which tends to disprove its existence, on the other; or, when the recovery depends upon the degree of credit to be given to the witnesses on either side, whatever may be the opinion of the judge at the trial, he should not interfere; because these are questions to which the jury alone can respond. *Per BROWN, J.*

But when the evidence is of such a character that the court in bank would be bound to set aside the verdict, (should the jury find one,) as unsupported by the evidence, it is the duty of the court to nonsuit the plaintiff. *Per BROWN, J.*

APPEAL by the plaintiff from a judgment of nonsuit, entered at a special term. The action was brought to recover the value of the plaintiff's mill, situated about 67 feet east of the Hudson river rail road track, at Tarrytown, which was destroyed by fire, on the 7th of February, 1852, communicated, as the plaintiff claimed, by sparks from the defendant's locomotives. The complaint alleged negligence and carelessness in constructing the engine, as well as in managing and conducting the same. The facts appearing on the trial are set forth in the opinion of the court.

S. E. Lyon, for the plaintiff.

T. M. North, for the defendant.

By the Court, BROWN, J. At the time the accident occurred which is the subject of this action, the defendant was in the lawful and rightful use of its road, operating its trains in the usual and customary manner by means of locomotive engines. It was doing just what it was created to do, and just what the law authorized it to do, and if it was done with due care and circumspection, and with a due regard to the rights of others, it incurred no special responsibility. For if it could

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not employ fire to generate steam, as a motive power, it could not fulfill the end of its being. If the nature of the enterprise in which it was engaged was in any degree hazardous to the property of others in the vicinity of the road, it was not responsible for that hazard further than as it imposed upon the company the duty of greater care and caution and skill in the conduct of its business. Travel and transportation by railway has become one of the necessities of human life, and those who own or erect buildings in the vicinity of such structures must be content to bear their share of the hazards, if any, incident to the business. These observations are made to show that in seeking to render the company liable in this action for the destruction of his mill, the plaintiff must do what must be done by every other plaintiff against every other defendant in a similar action—show that the act or omission of which he complains was the act or omission of the defendant, and also that such act or omission was a negligent one. It is not enough for him to show that the defendant uses fire to generate steam; that the locomotive engines running upon the road occasionally emit sparks of fire and cinders; that his mill was within 67 feet of the track of the road, with some of the west windows and those next the road left open, and carpenter's shavings and other combustible matter upon the floor; that no business was carried on at the mill, and no one employed about it at the time; that the west wind was blowing stiffly when the fire was discovered, and that the company's trains passed to and fro several times each day. These circumstances are quite material and essential, but without something in addition they do not establish the principal fact alleged in the complaint, because they do not exclude the idea that the fire may have originated in some other source. Standing alone, these circumstances do no more than make out a possible case that possibly the fire proceeded from the defendant's locomotives. It is not enough for the plaintiff to show a possibility that the fire was communicated to the mill by sparks emitted by the defendant's locomotives. He cannot recover upon a

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possibility. Even if the evidence went farther and brought the fact sought to be proved within a probability, still the plaintiff must fail: because, to justify a verdict, the law requires, not positive proof it is true, but such proof as will leave no reasonable doubt of the existence of the fact upon which it must rest. The rights of property, and all claims to its possession and enjoyment, are dependent upon the existence of certain facts. And when they are disputed, and become the subjects of judicial investigation, if juries could assume their existence, without sufficient evidence, and render verdicts upon possibility, probability and conjecture, the courts would be shorn of their legitimate authority, and the wise and just rules of the common law, as they have been recognized and applied from time immemorial, would lose their principal value. It is amongst the primary and most important duties of the court to order a nonsuit, or to grant a new trial, whenever the evidence is not sufficient to authorize or sustain a verdict. The power to do so is highly conservative and essential to the due administration of justice. It is a power which the courts must constantly and freely exercise, unless they will consent to see the immature and imperfect conclusions of juries substituted for the rule of right. When there is proof which, uncontradicted, makes out the fact upon which the recovery depends, on the one side, and there is testimony which tends to disprove its existence, on the other; or when the recovery depends upon the degree of credit to be given to the witnesses on either side, whatever may be the opinion of the judge at the trial, he should not interfere, because these are questions to which, according to the frame and constitution of our courts, the jury alone can respond. But when the evidence is of such a character that the court in bank would be bound to set aside the verdict, (should the jury find one,) as unsupported by the evidence, it is the duty of the court to nonsuit the plaintiff. (*Stuart v. Simpson*, 1 *Wend.* 376. *Demyer v. Souzer*, 6 *id.* 436. *Rudd v. Davis*, 3 *Hill*, 287.) The decision of such a motion must also be regarded as some test of the weight and

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force of the plaintiff's evidence. For should it be denied, the jury will naturally infer, and would have a right to infer, that in the opinion of the judge there is evidence (if the jury give it credit) to justify a verdict in favor of the plaintiff.

The plaintiff's mill was destroyed on the 7th of February, 1852. None of the witnesses examined at the trial saw the fire sooner than a period of time between fifteen minutes and twenty minutes past two o'clock in the afternoon. Two of the company's trains passed the *locus in quo* about the middle of the day on which the fire occurred—the train of which John D. Vermeule was the conductor from the south, and the train of which Lewis F. Minard was the conductor, drawn by the engine Oneida, from the north. The complaint charged that the fire which destroyed the mill proceeded from the locomotive of the train from the south. This was the theory of the plaintiff's case (as I infer from the papers) when the action was tried before Mr. Justice STRONG, in 1853. Upon the trial before Mr. Justice LOTT in 1858, which is now under review, it was proved that when the up train (Vermeule's) passed the *locus in quo* between 15 and 20 minutes past two P. M., the mill was on fire; and there was also read a stipulation by the plaintiff's attorney that he should insist "that the burning of the plaintiff's mill was caused by the engine Oneida, attached to the down train under charge of conductor Minard." I allude to this for no other purpose but to show that the inquiry is narrowed to the sparks and fire emitted by the locomotive attached to Minard's train. I have said that none of the witnesses saw the fire sooner than a period between 15 and 20 minutes past two o'clock P. M. I refer to the evidence. Michael Barrett, a witness in the employment of the plaintiff, was engaged drawing gravel at the time; went to dinner at 12 o'clock; the dinner is one hour. Had drawn one lead after dinner, and was going back for the second lead when he saw the smoke. Thinks he saw the smoke between 15 and 17 minutes past two o'clock. Thinks it was from 20 to 25 minutes before he saw the smoke that he

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heard a train pass. Again, he thinks the train passed 15 or 20 minutes before he saw the smoke. Michael Morrisson, another witness in the employment of the plaintiff, said they went to dinner at 12 o'clock, and their nooning was about one hour. Barrett called his attention to the fire, about an hour after nooning. These were the only witnesses examined for the plaintiff who gave evidence of the time the fire was first discovered. John D. Vermeule was examined for the defendant, and as to this point said: He passed the mill with the up train from 15 to 20 minutes past two P. M. It was then on fire. Jerome Bowers, another witness for the defendant, also, first saw the fire after Vermeule's train passed up. It was due at Tarrytown at 2.17 or 2.20, and after it passed he went out and looked over the track and saw the fire. There is no discrepancy. All these witnesses first saw the fire at or after the time Vermeule's train passed up, which was at 17 minutes past two. The plaintiff also examined L. F. Minard, the conductor of the down train, to show when that passed the mill. He said he passed it at one o'clock P. M.; and in this fact he is corroborated by Jerome Bowers, the track master. There is no other testimony as to the time of the passage of Minard's train. It results from this statement of the testimony, that Minard's train, which is charged with causing the fire, passed the mill at one o'clock P. M. That one hour and 17 minutes elapsed before any fire was discovered. And that the train which the witnesses Barnett, Barrett and Morrisson heard pass was not Minard's train down, but Vermeule's train up, because they say it passed 15 or 20 minutes before they saw the fire. It is worthy of remark that no witness saw the Oneida pass down but the track master Bowers, to whose evidence I will revert presently. No one saw any sparks or cinders emitted by the locomotive in the vicinity of the mill; and no witness has been examined, but Bowers, who was near the mill during the hour and 17 minutes that elapsed from the time the Oneida passed, to the time the fire was discovered, or who is able to say whether persons were in the vicinity of the

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mill or not. Indeed none of the plaintiff's witnesses were at the mill, or say they saw it, for several days before the fire. I think the plaintiff was bound to furnish some proof of this kind. He proves that the defendant's locomotive was within 67 feet of his mill at one o'clock on the day of the accident, and might have communicated the fire; but he omits to prove, or is unable to prove, that other persons were not near the mill during the time to which I refer, who might also have communicated the fire. Had it appeared upon the trial that no persons were in or about the mill during the forepart of the day of the fire, or even during the 1 hour and 17 minutes after the Oneida passed, who could either accidentally or intentionally have fired the mill, he would have supplied a very necessary link in the chain of circumstantial proof by which he sought to fix the liability of the company, and without which no jury would have been authorized to give him a verdict. It would be unreasonable to charge the Oneida with the destruction of the plaintiff's property because she carried fire in the furnace, and passed within 67 feet an hour and 17 minutes before the smoke or flames made their appearance. The proof does not disclose the state of the population in the vicinity of the mill; but it does appear that it was situate between Tarrytown and Irvington; and it is not too much to assume that it was in a populous neighborhood, and exposed to the intrusions and risks which attend unoccupied buildings in such places. If the proposition of the plaintiff's counsel, that he had a right to claim a verdict upon the evidence, could be entertained, it would fix the liability of rail road companies operating their roads with locomotive engines for all accidents by fire in the vicinity of their roads, which they were not able to prove proceeded from some other source.

There is another part of the evidence which I should notice. Robert Riker, a witness for the defendant, went to the mill five or six days before the fire, tried to get in and failed. He then went to the house and got the key, entered the building, removed some tools which he had there, and left. He found

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the windows open, and left them open. He was carpentering in the mill, leaving shavings, hay, straw and packing boxes in the basement. "The least spark," he says, "in the world through the windows would have set it on fire." The theory of the plaintiff upon the trial was that the sparks or cinders from the Oneida were driven by the west wind into these open windows upon the shavings, hay and straw upon the basement floor. We have seen that the Oneida passed at one o'clock, and the sparks and cinders, if they caused fire, were driven in amongst the combustible materials at that hour. It happened, however, that Jerome Bowers, the track master, passed over the track near the mill, making his customary examinations, at twenty-five minutes past one. He saw nothing out of the way—no indications of fire or smoke—and there was nothing between the mill and the witness to obstruct his sight. He could see the mill for the space of two hundred feet before he got to it. He first discovered the fire at Irvington, a mile and a half below, after Vermeule's train passed up, which was at two o'clock and seventeen minutes. Now I submit, that this evidence is wholly irreconcilable with the only theory which the plaintiff sets up; for had the sparks and cinders been driven in among the hay and shavings at one o'clock, some indications of such an event would have exhibited themselves at the time Bowers made his examinations.

I am therefore brought to conclude that the evidence upon the principal question was not of such a character as entitled the plaintiff to claim a verdict from the jury, and that he was properly nonsuited at the trial. The question of the alleged inefficient and negligent construction of the plaintiff's engine and fire apparatus, I decline to consider.

The judgment should be affirmed.

LEHMAN, adm'r, &c. vs. THE CITY OF BROOKLYN.

In an action by the administrator of a deceased person, to recover damages for the negligence of the defendant, whereby the intestate was deprived of his life, to entitle the plaintiff to recover, it must appear affirmatively that the accident resulted wholly from the negligence of the defendant, and that the negligence and improvidence of the intestate did not contribute to bring it about.

The negligence of the defendant must be made out and established by proof, and not be left to be inferred from circumstances.

Where there was a well in one of the streets of the city of Brooklyn, level with the grade of the sidewalk, and usually covered with a wooden cover having a square opening in the center, which was also covered with a lid, opening and shutting on leather hinges, and the intestate, a child four years of age, was found dead in the well, within half an hour after leaving his home; *Held*, in an action against the city, by the administrator of the child, to recover damages for negligence, that, considering the tender years of the child, his inability to take care of himself, and the nature of the accident, the plaintiff was bound to show how the accident occurred, and to throw some light upon the causes which led the child to the vicinity of the well, and the condition of the opening into the well, and whether it was closed or not when the deceased came there.

That merely showing the existence of the well, with its covering, and the child being found in the water, was not sufficient to entitle the plaintiff to recover, or to put the city upon the defense.

The interest which the next of kin have in the life of a person negligently killed, under the acts of 1847 and 1849, is merely pecuniary. The personal wrong done to, or the suffering of the person killed have nothing to do with the damages. Nor should the anguish and grief of his parents enter into the estimate of the amount to be recovered.

Where a father brought an action to recover for the negligence of the defendant, in causing the death of his son, a child four years of age, and recovered a verdict for \$1500; *Held* that the damages were unreasonable and excessive, and should have been merely nominal.

A PPEAL from a judgment of the city court of Brooklyn.
The facts are detailed in the opinion of the court.

James J. Lowrie, for the plaintiff.

Henry Hayner, for the defendant.

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By the Court, BROWN, J. This action was most indifferently and inefficiently tried, for the examinations failed to bring out the facts upon which its determination must ultimately depend.

The plaintiff is the administrator of George Lehman, deceased, and the action is for negligence, whereby the plaintiff's intestate was deprived of his life, on the 5th May, 1856. It appeared by the proof, that at the time of the alleged death there was a well within the line and upon the sidewalk of Division avenue, in the city of Brooklyn. The mouth of the well being level with the grade of the sidewalk, which is flagged about two feet in or through the center, and the well being on the northeast side, two and a half or three feet from the flagging, and between that and the fence. The diameter of the well was about five feet, its depth ten or twelve feet, with eight feet of water. At the time of the accident there was a circular wood cover over the well, flat, and about five feet in diameter, so that it could be removed, with a square opening about the center. This opening was also covered with a lid fastened with leather hinges, which could be opened or shut at pleasure. This covering or lid was kept from passing into the well by the leather hinges fastened with nails upon the one side, and a cleet upon the opposite side. This cleet prevented the square lid or covering from falling through. It also appeared that the plaintiff's intestate was last seen at the plaintiff's (his father's) house, about 9 o'clock on the morning of the 5th May, 1856, and at half past 9 he was found dead in this well. He was a lad four years and one month old and resided with his father, in the immediate vicinity of the well. The square lid or covering, which was about one and an half feet square, was found in the water with the body of the child. It was also proved that Division avenue was a public street and thoroughfare, and had been for a long time. This was the case on the part of the plaintiff when he closed his testimony and rested. And thereupon the defendant moved that the complaint be dismissed, on ac-

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count of the insufficiency of the proof to sustain it. The motion was denied, and the defendant excepted.

The legal principles upon which this action is to be determined are quite well settled, for the duty and obligation of the city to keep its streets and avenues in a safe and secure position for the passage of persons and vehicles is not open to any doubt. The gist of the action, however, is negligence, which must be made out and established by proof, and not left to be inferred from circumstances. The proof need not be direct and positive, by some one who witnessed the occurrence and saw how it happened; but it must be such as shall satisfy reasonable and well balanced minds that it resulted from the negligence of the defendant. It is not safe, I think, to say that because there was a well in the street, and the child was found drowned in its waters within half an hour after he was seen in health, the defendant's negligence is made out. This theory ignores a portion of the evidence, and overlooks a legal principle which forms a material element in determining the question. To entitle the plaintiff to recover, it must appear, affirmatively, that the accident resulted wholly from the negligence of the defendant, and that the negligence and improvidence of the plaintiff did not contribute to bring it about. The well had a covering sufficient to protect persons from falling into it; and if the covering was upon the well, which (in the absence of proof to the contrary) may be plainly inferred, then no negligence which could result in the death of the child was proved. The proof disclosed nothing of the condition of the well at the time of the accident; whether it was open or closed, or whether, when closed, the covering was sufficient security to passengers upon the street, does not appear. It did not show how the child came there; whether sent by its parents or straying away of its own will. It was four years of age, entirely incapable of taking care of itself. If sent from home by its parents, or if suffered by them to stray about the streets without a protector, it was gross carelessness, and contributed in no small

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degree to the accident which put an end to its life. In *Hartfield v. Roper*, (21 *Wend.* 615,) a young child, of two years of age, suffered by its parents to run upon the highway, where it was run over and injured, was not permitted to recover, upon the ground that, being without discretion or the ability to take care of itself, by being upon the highway, it contributed to the act which injured it. In giving the opinion, the court say: "But at the tender age of two or three years, or even more, the infant cannot personally exercise that degree of discretion which becomes instinctive at an advanced age, and for which the law must make him responsible through others, if the doctrine of mutual care, between the parties using the road, is to be enforced in all cases." Considering the tender years of this infant, his inability to take care of himself, and the nature of the accident, the plaintiff was bound to show how the accident occurred, and to throw some light upon the causes which led the child to the vicinity of the well, and the condition of the opening into the well, and whether it was closed or not when the child came there. Merely showing the existence of the well, with the covering spoken of by the witnesses, and the child being found in the water, was not, in my judgment, sufficient to entitle the plaintiff to recover, or to put the city upon the defense.

There is another serious objection to the judgment. The damages given are excessive and unreasonable. The personal wrong done to, or the suffering of, the child, have nothing to do with the damages. Nor should the anguish and grief of his parents enter into the estimate of the amount to be recovered. The interest which the next of kin have in the life of a person negligently killed, is pecuniary. The purpose of the acts of 1847 and 1849 was to give to the widow and next of kin a pecuniary compensation for the loss they might suffer by the destruction of the life of a husband, parent, or other person upon whom they might be dependent, or the preservation of whose life was of any pecuniary value to them. The language of the act is express, that the jury are to "give such

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damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of the deceased," subject to the limitation as to the amount, mentioned in the statute. The money, when recovered, is to be distributed to the widow and next of kin, according to the statute for the distribution of personal property. In the present action the next of kin to whom compensation is to be made, for the pecuniary injury, is the father. The jury estimated this pecuniary injury at \$1500 ; that is, that the plaintiff in this action was the pecuniary loser of \$1500 by the accident. The child was four years and one month old when he died. For the next ten years, had he lived, it may safely be said that he would have been a burthen in place of a benefit, pecuniarily, to his parents. And for the next seven years after that, if educated to a profession or mercantile calling, or put to a trade, he would have done well—much better than the majority of lads—if he supported himself. During all this time he would be exposed to disease and death, and the other ills that beset human life in all its stages. The life of this little boy, however priceless may have been its value in other aspects, had no pecuniary value which the jury could justly estimate at \$1500. If the plaintiff recovered at all, the damages should have been nominal. For these reasons I think the judgment should be reversed and a new trial granted, with costs to abide the event.

[DUTCHESS GENERAL TERM, May 9, 1859. *Lott, Emott and Brown, Justices.*]

SEWARD *vs.* BEACH and TOWER.

An act of the legislature, which prohibits the transportation, over a specified plank road, of any load of iron or iron ore, of more than two tons' weight, unless it be upon a vehicle with wheels having a tire of at least six inches in width, is not unconstitutional and void on the ground that it operates as an obstruction upon the iron business and those engaged in it, which is not extended to other articles of freight, or classes of persons.

As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose, by the statute.

And where a statute imposed a penalty of \$20, for any offense against it—"one half to the complainant, and the other half to the county treasurer of the county of Dutchess, for the benefit of the poor fund of said county," without saying who should sue, and bring the action for the penalty; *Held* that an individual bringing an action to recover penalties was bound to show some authority for suing; otherwise he could not recover.

THIS action was commenced before a justice of the peace of the county of Dutchess, to recover five penalties of \$20 each, under the act of March 17, 1857, "relative to a certain highway in the county of Dutchess." The plaintiff recovered a judgment, before the justice, which was affirmed, on appeal to the county court of Dutchess county, and the defendants appealed to this court.

John Thompson, for the appellants.

I. F. Barnard, for the plaintiff.

By the Court, BROWN, J. By the act of the 17th March, 1857, entitled "an act relative to a certain highway in the county of Dutchess," (a) the legislature have thought fit to prohibit the transportation over the Poughkeepsie and Stormville Plank Road of any load of iron or iron ore of more than two tons' weight, unless it be upon a vehicle with wheels constructed with tire of at least six inches in width. The object is, doubtless, to preserve the road from injury and destruction by enlarging the surface of the wheel in contact with the road,

(a) *Laws of 1857, vol. 1, p. 840.*

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when the weight exceeds two tons. The defendants take exception to the constitutional force and validity of the act, because it prohibits over two tons of two particular commodities being transported, unless in a given way, while it leaves the weight of other articles which may be passed over the road entirely unlimited. In short, that the act operates as an obstruction upon the iron business and those engaged in it, and not upon any others. This is a very good objection to the policy and good sense of the act; for a ton weight is a ton weight, whether it be of iron, iron ore, grain, hay or any thing else; but it cannot be regarded as inoperative and invalid on that account. It is an instance of that sort of special legislation which is the opprobrium of the statute book, which legislates at particular local evils, and at particular persons and grievances, in place of passing general acts which shall be a rule and a guide to the people of the whole state. This act is intended to suppress what I can well imagine to be a real grievance, and what would doubtless be a grievance every where, whenever it existed; and in place of being limited to the Poughkeepsie and Stormville Plank Road, and the iron manufacturers and dealers who transport these commodities over the road, might have been made general in its operation, and applied with greater wisdom to the entire state. The regulation of roads and highways, and the modes of travel and transportation thereon, is a part of the ordinary duties of the legislature. It is entirely within its control. It may say what shall be the rate of speed at which horses or vehicles may proceed, to which side parties meeting shall turn, in what vehicles and in what quantities merchandise or materials of any kind may be transported. The greater includes the less; and if it can regulate the weight of all merchandise which may be carried at a single load, it can certainly regulate the weight of the single articles of iron and iron ore. The act in question applies as a prohibition upon all persons carrying iron and iron ore in quantities greater than two tons, unless in the prescribed vehicles, and

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not to the defendants or to any special class of persons, and thereby I think it is not obnoxious to the objection taken against it.

James A. Seward, the plaintiff, brings this action to recover five of the penalties imposed by the act ; and he is bound to show some authority for bringing the action. Concede that the act has been broken, and the penalties incurred, by what right does James A. Seward institute and maintain this proceeding? The law must be so construed as to give it effect, if possible, and at the same time it must be construed strictly, for it is a penal statute. It imposes a penalty of \$20 for every offense against it ; “one half to the complainant and the other half to the county treasurer of the county of Dutchess, for the benefit of the poor fund of said county.” It does not say who shall sue and bring the action for the penalty. It is silent on that subject. If the person making the complaint may sue because he is entitled to one half of the penalty, why may not the treasurer of the county of Dutchess also sue, who is entitled to the other half. And if an interest in the penalty confers the right to bring the action, why should not both the complainant and the county treasurer unite for that purpose. The amendment to the act, passed at the same session of the legislature, April 14, 1857, does not overcome the difficulty. It adds, at the end of the second section, these words : “and in case the complainant fails to sustain his complaint, he shall be holden for the costs thereof.” This provision seems to imply that the person making the complaint is not to bring the action ; for the plaintiff prosecuting such an action and failing, there would be judgment against him for the costs of the action, under the general law in regard to costs, and the provision in the amendment would be unnecessary. Had the amendment declared that, in case the complainant fails to sustain his complaint, judgment should be entered against him for the costs, the implication would have been clear and certain that it was intended he should be the plaintiff prosecuting the action ; for otherwise

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he would not have been in a condition to have a judgment entered against him. To say "he shall be holden for the costs," implies that he is not to be a party to the action, and that this provision was necessary to fix his liability. The penalties imposed by the act under consideration are not given to any person who will sue for the same, or to such person in common with another. *Blackstone*, in his commentaries, (vol. 3, p. 161,) says: "More usually these forfeitures created by statute are given at large to any common informer; or in other words, to any such person or persons as will sue for the same; and hence such actions are called popular actions, because they are given to the people in general. Sometimes one part is given to the king, to the poor or to some public use, and the other part to the informer or prosecutor, and then the suit is called a *qui tam* action, because it is brought by a person '*qui tam pro domino rege, &c. quam pro se ipso in hac parti sequitur.*' When a penal statute expressly gives the whole or a part of a penalty to a common informer and enables him generally to sue for the same, debt is sustainable, and he need not declare *qui tam*, unless when the penalty is given for a contempt; but if there be no express provision enabling an informer to sue, debt cannot be supported in his name for the recovery of the penalty." (1 *Chitty's Pl.* 105.) As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose by the statute. (*Colburn v. Swett*, 1 *Metc.* 232. *Barnard v. Gostling and another*, 2 *East*, 569. *Fleming qui tam v. Bailey*, 5 *id.* 513. *Bacon's Abr., Action qui tam*, A.)

These authorities appear to me to decide the question against the plaintiff. The judgments in the justice's and in the county courts should be reversed.

[DUTCHESS GENERAL TERM, May 9, 1859. *Lott, Emott and Brown, Justices.*]

MITCHELL *vs.* Cook and others.

Where a party brings a suit, as assignee of a mortgage, to foreclose the same, and fails in such suit in consequence of a defect in his title as assignee, the judgment of dismissal is no bar to a second action of foreclosure, brought by him after he has perfected his title by taking the requisite assignments.

The defendants executed a mortgage for \$1400 to C., an individual banker, doing business under the name of the White Plains Bank. C. transferred the mortgage to the comptroller, to secure the redemption of the circulating notes of the bank. After such transfer was made, the defendants, with notice thereof, paid \$1000, upon the mortgage, to the cashier of the bank. The plaintiff advanced \$1400 to C. on an agreement that C. should procure from the comptroller a reassignment of the mortgage, for the plaintiff's benefit. C. paid that sum to the comptroller, and took a transfer of the mortgage, to himself, and delivered the security to the plaintiff, but without executing any formal assignment to him. In an action brought by the plaintiff, as assignee of the mortgage, to foreclose the same, the court of appeals decided that the assignment from the comptroller to C. was void, for want of authority in the comptroller to make the same, and that the plaintiff therefore had no title as assignee. The plaintiff having subsequently procured assignments of the mortgage, from C. and from the bank, brought this action to foreclose the same mortgage.

Held, 1. That the judgment of the court of appeals, in the former suit, was not a bar to the present action, on the ground of the question being *res adjudicata*.

2. That after the assignment of the mortgage, to the comptroller, the cashier of the bank had no right to receive a payment thereon; and that the plaintiff, being a *bona fide* assignee without notice, was not bound thereby.

3. That after the mortgage had been reassigned, by the comptroller, to C., the latter, and the then owner of the bank, had a right to assign and deliver the mortgage to the plaintiff, who had furnished the money to pay it, upon the faith of an agreement that he should become the owner.

THIS was an appeal from a judgment rendered at a special term. The action was brought for the foreclosure of a mortgage, and the judgment was in favor of the plaintiff. The following opinion was given by the judge who decided the cause at the special term:

S. B. STRONG, J. "This is an action to foreclose a mortgage given by the defendants, Cook and wife, to Elisha Crawford, and eventually assigned by him, and also by the White

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Plains Bank, of which he had been president, to the plaintiff. The mortgage was dated on the 4th of September, 1844, and given to secure the payment of fourteen hundred dollars in seven years from its date, with interest at the rate of six per cent, payable semi-annually, according to a bond from Cook to Crawford of the same date. Crawford was, or is alleged to have been at the time, an individual banker, transacting business in the name or under the designation of "The White Plains Bank." Crawford testified on his last examination that the bank was instituted by him as an individual banker, under the general act to authorize the business of banking. (*Laws of 1838, ch. 260, p. 245.*) This is confirmed by the entries in the books kept in the office of the superintendent of the state bank department. The ledger opening an account with the bank, is headed in the following words: "Dr. White Plains Bank stocks, individual bank owned by Elisha Crawford of White Plains. Cr." There is also an affidavit on file in that office, made by Crawford on the 25th of July, 1849, stating that the bank was an individual bank, and that no person was interested with him, directly or indirectly, in the securities deposited with the comptroller. The loan to Cook was negotiated by one Richard Cadmus, who was at the time cashier, and who now asserts that he was the owner of the bank. This allegation that he was the owner is, to some extent, confirmed by the testimony of George Crawford and William H. Seely, from which it would seem that Cadmus, G. Crawford and Seely, had originally owned each one third of the bank, and that Crawford and Seely had transferred their interest to Cadmus. Seely, however, testified that such ownership consisted simply in, and did not extend beyond, the profits and plates. If they were the absolute owners, they were associated bankers, and they should have been described as such in the books of the bank department. But there is no evidence that any entry to that effect was made in the books. It would not be right to infer, except from clear evidence, that all of these parties had perpetrated a fraud upon

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the state, for the purpose of obtaining facilities as an individual banker, to which they would not have been entitled as an association. Cadmus, when asked whether he owned the mortgages which were in the hands of and deposited with the comptroller, did not answer the question directly, but said, "I considered them to be under my control at any moment." There is no formal conveyance by Cadmus to any one, of the bank, or of any of the securities belonging to it, previous to July, 1846, when he became, as he states, a bankrupt. He then made an assignment of his property for the benefit of his creditors, in terms sufficiently broad to have covered his interest in the bank, if he had any. But although one of his assignees was examined as a witness in behalf of the defendants, it does not appear that the assignees ever claimed any interest in the bank, or any of its securities, or that they interfered in any way in its management. Besides, when Cook, on a subsequent day, made a tender of what he alleged to be due on the mortgage, he made such tender to Elisha Crawford, and not to Cadmus or his assignees.

There is no evidence that Cook, at the time, consulted with Cadmus; but it may, I think, be reasonably inferred that he did, as they had previously transacted much of the business together, and appear from the evident leaning shown in the testimony of Cadmus to be on friendly terms. The plain inference from all the reliable evidence is, that although when the loan to Cook was made, Cadmus had an interest in the affairs of the bank, yet it did not extend to its capital or the securities taken in its behalf and assigned to the state comptroller. The bond and mortgage given by Cook were obtained for the purpose of depositing them in the comptroller's office, and securing the amount in circulating notes intended for the bank. Examinations as to the value of the property, for the satisfaction of the comptroller, were made with so much publicity that Cook must have been aware of the object in making the loan. On the 5th of September, 1844, the mortgagee assigned the bond and mortgage to the comptroller, "to se-

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cure the redemption of the circulating notes of the White Plains Bank." On the 20th of the same month Cook, who had in the meantime received the amount for which his securities had been given, in the circulating notes of the bank, signed an admission that he was indebted to Elisha Crawford in the sum of \$1400, secured by the said bond and mortgage, and that he had received notice that such bond and mortgage had been assigned by E. Crawford to the comptroller of the state; subsequently Crawford (and when I speak of a person having that name, without any other designation, I mean the mortgagee) signed a paper dated on the 21st of January, 1844, (but mistaken in the year, as that must have been in 1845,) authorizing Cadmus to collect the interest on several bonds and mortgages, and among others the bond and mortgage from Cook.

Cadmus swears that he also had written authority from Crawford to collect and receive the principal; but in this he is directly contradicted by Crawford; and as one paper only is produced, and that simply authorizes the collection of the interest, and no satisfactory reason is given for the non-production of the supposed documents, if they ever existed, and especially as an alleged authority to receive the principal due or to become due on securities assigned to the comptroller, would be wholly nugatory, and no reason is shown why there should be any expectation that the principal moneys secured by Cook's mortgage would be paid before they became payable by the terms of the securities, (in 1851,) the inference is strong that no authority was given by Crawford to Cadmus to receive the principal moneys loaned to Cook.

On the first of January, 1846, Cook paid to Cadmus and took his receipt for \$1000 of the principal and all the interest due on the entire principal moneys secured by the said bond and mortgage. It has been said already that no authority has been shown, nor can any be inferred from the proof, from Crawford to Cadmus, to receive such principal. His employment as cashier of the bank did not confer such authority.

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Besides, if he received the money as a reduction to that extent of the principal, it was a fraud upon the state; or it would have been, if he could have effectuated that purpose. He knew that the comptroller could not receive payment of a part of the principal; nor would it seem that he intended to pay it to that officer, as he made no attempt to do so; but, as he confessed, he mingled the money with his own funds; as to Cook, he knew that his bond and mortgage had been assigned to the comptroller to secure the payment of the circulating notes of the bank; and as those papers were not produced by Cadmus at the time, he had strong reason to suppose, if he did not actually know, that they were still held by the comptroller for the purpose for which they had been assigned to him. If, under these circumstances, he intended that his payment should operate as a present reduction of the principal, he was a participator in a fraud.

It is a characteristic of fraud that it cannot avail the perpetrator, and if the usual effect could be fortified, it would be in this instance, by the consideration that the act was manifestly against public policy. The payment could not operate as an absolute reduction of the principal. If the state had been under the necessity of selling the securities, the sale would have conferred a title to the entire principal; a reconveyance to the assignor would have the same effect, unless he had participated in the fraud. In this case, the assignor had neither received nor sanctioned the receipt of the principal. It is clear that Crawford was not consulted about the payment, and that he knew nothing about it until long after it had been made. Cadmus swears that he thinks that he communicated it to Crawford before he took a reassignment from the comptroller; but Crawford swears positively that he had heard nothing about it until after he had transferred the securities to the plaintiff; and in this he is supported by what took place when it was mentioned to him by his brother, and subsequently on the same day when Cook and his counsel, Mr. C. P. Smith, called to make the

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tender to which I have alluded. The witnesses do not entirely agree as to what occurred at the last mentioned interview. Mr. Smith says, that Crawford said he knew or had heard of the payment: he did not recollect that Crawford remarked, "I have just heard of it," although he may have said so. But George Crawford, and Rust, (a witness introduced by the defendants,) both testified that Crawford said that he had just heard of it from his brother. The testimony of Cadmus, that he thought, but did not know, that he had made a previous communication of the payment to Crawford, is outweighed by the positive denial of the latter, and the circumstances sustaining such denial narrated by the other witnesses. Shortly previous to the 18th of July, 1846, the plaintiff delivered to Crawford circulating notes of the White Plains Bank, amounting to fourteen hundred dollars, on an agreement between them that Crawford should pay them to the comptroller, and take from him a reassignment of Cook's bond and mortgage, for the benefit of the plaintiff. On the day last particularized, Crawford delivered the same notes to the comptroller, and received from him a reassignment of the bond and mortgage, bearing date on the same day. Within a few days afterwards Crawford delivered those securities to the plaintiff, but did not then execute any formal assignment of them. The plaintiff thereupon instituted a suit against Cook and wife, to foreclose the mortgage. They defended the suit, and the action was heard before Mr. Justice McCoun at a special term. The evidence before him was much the same as that which has been adduced in this case; except that there is now evidence from the bank department that Crawford was an individual banker, which was not adduced before; and there have been since some additional acts confirmatory of the plaintiff's title. Judge McCoun rendered a judgment in favor of the plaintiff, directing a foreclosure of the mortgage, for the entire principal and the interest thereon, from the time when the plaintiff acquired a title to or interest in the securities. The judgment was unanimously affirmed at a

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general term, by the same learned judge, and Judges Barculo and Morse. Their judgment was reversed by the court of appeals, solely on the grounds that the comptroller could not convey the bond and mortgage to any other than the person who had assigned it to him, either directly or indirectly, and there had been no transfer to the plaintiff after the reassignment to the plaintiff. The court of appeals could not have decided, and of course did not decide, that Crawford could not subsequently assign the securities to the plaintiff for a consideration primarily advanced by him. The judgment of this court, at special term and at general term, remains unaffected, except as to the points mentioned in the decision of the court of appeals, to which I have alluded. It forms a respectable, if not a controlling, authority in favor of the conclusion which I have thus far indicated, and which must have been substantially adopted by Judges McCoun, Barculo and Morse.

After the judgment of the court of appeals had been rendered, and in the month of April, 1853, Crawford executed an assignment of the bond and mortgage in question, to the plaintiff. Crawford had previously, on the 16th of December, 1849, conveyed the bank to one Emory B. Pottle of Naples, in the county of Ontario. Pottle, on the 2d of March, 1851, transferred the bank to Seth C. Hart of the same place, and the White Plains Bank, by Hart as its president, on the 6th of July, 1853, assigned all its interest in the bond and mortgage from Cook to the plaintiff. On the 22d of July, 1846, Cook tendered four hundred dollars, and the interest upon that, to Crawford, in full satisfaction of the bond and mortgage, which Crawford refused to receive. In my narration of the facts, I have so far considered the questions of law, that it is not necessary for me to do much more than state my conclusions.

The judgment of the court of appeals cannot operate as an estoppel to the plaintiff in this suit, as he has since perfected his right, so as to avoid the objections which then operated against him. He has since received an assignment from the

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mortgagee, and also from the bank. Neither the bank nor the mortgagee oppose his claim. It is clear that the plaintiff has now the sole title to the mortgage, if any thing remains due upon it.

The main question is, whether the mortgage is still an incumbrance upon the land; and if so, to what extent? If the payment of \$1000 to Cadmus was, at the time, or subsequently became, effective as a reduction of the debt, and there was a valid tender of the residue, then the land is entirely relieved from the lien, and the plaintiff must fail in this action, although he would still have a claim for such residue against Cook, on the bond.

Did, then, the payment of \$1000 to Cadmus operate, at the time or afterwards, as a reduction of the principal secured by the bond and mortgage? As I have already mentioned, it could not reduce such principal while the securities were in the comptroller's office. Neither could it have such effect at any time, if Cadmus neither had any title to the securities nor any legitimate authority to receive such principal or any part of it. If I am right in inferring that Cadmus had neither such title or authority, then the payment was inoperative, except possibly to create a personal claim against him. But if, as the counsel for the defendants contended on the trial, Cadmus owned the bank, and the security was taken nominally for Crawford, but actually for him, and the money had been paid to and accepted by Cadmus on a promise or understanding that it should be credited on the bond and mortgage, when he should again become entitled to and have them, could Cook now claim a credit for the amount, and a proportionate reduction of the principal? Neither Cook nor Cadmus, nor the bank who owned it, nor Crawford as a trustee for any one, could claim these securities from the comptroller without the actual payment of the principal to him. The money received from Cook by Cadmus was never paid to that officer, nor was any payment made to him by or on behalf of Cook or Cadmus or the bank. The money which

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went into the comptroller's office belonged wholly to the plaintiff. Neither Cook, Cadmus, the bank, nor Crawford, had any interest in it.

The payment was not, in fact, made for either of them. Crawford paid the money, as he alone could do that and receive a reassignment of the bond and mortgage.

It may be as the court of appeals decided, that on receiving such reassignment, he alone had, technically, a right to foreclose the mortgage. But surely neither the power nor duty of the comptroller could interfere or prevent the completion of a previous arrangement between Crawford and the plaintiff, or impair the rights or equities of the plaintiff under such arrangement. Can it be, that if a mortgagee, while his mortgage is in the possession of the comptroller, under the act relative to the free banks, agrees with a third person that if he will furnish the requisite funds, the mortgage shall be procured with such funds, and the security shall be transferred to him who advances the money, and the money is accordingly advanced and paid to the comptroller, and a retransfer had, the mortgagee cannot effectually assign the securities to the lender; or, that if he should then refuse to do so, the lender cannot coerce such transfer in a court of equity? It is so palpable that, under such circumstances, the assignment could be legally made, or, if necessary, coerced, that the contrary could never have been supposed, but for a misapprehension of the judgment of the court of appeals in the suit of *Mitchell v. Cook*. In this case there was primarily such an agreement, and the parties have endeavored to consummate it, and have done all that is necessary for that purpose, so far as it relates to them.

As Crawford did not pay his own money, he acted in a fiduciary capacity in taking the reassignment. For whom did he thus act? Not for the bank, if that was owned at the time by any other person, for the money paid by him was not furnished by said bank; nor for Cook, as his money had not been received by Crawford, and of course was not applied by

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him for any purpose ; nor for Cadmus, who had received such money ; but, most assuredly, for the plaintiff, who had actually furnished the identical means.

If the controlling question in this case had been, which of the parties has the greater equity, it seems to me that the decision must have been in favor of the plaintiff. It is true that Cook has actually paid his money with an intent that it should be credited to him on his bond and mortgage. But he knew that those papers had been transferred to, and as he had every reason to believe, if he did not actually know, were then held by, the comptroller as security for the payment of the circulating notes of the bank to the same amount. He must have known—for every one is presumed to know the law—that the payment was unauthorized at the time, and that it could not avail him unless the bank or the payee should return the notes or pay the amount to the comptroller. He must therefore have trusted mainly to the responsibility of Cadmus, to whom he paid the money. It would seem from some of the testimony that he did so. Cadmus failed, and the money was never paid to the state officer. On the other hand, the plaintiff advanced the entire amount, and his funds were the sole consideration of the transfer. Knowing the law, as he did know it, not only presumptively but actually, he was aware that no part of the principal could be legally paid to another, while the bond and mortgage were held by the comptroller. He had a right to presume, and no doubt did suppose, that no unlawful attempt had been made to pay a part of the principal, and that the whole of it was still due. He was an innocent and bona fide purchaser of securities which, as they read, and as he had a right to suppose they were, were still valid for the entire amount.

If the payment by Cook had entitled him to a reduction of the principal, the tender of the balance would have been ineffectual ; because, first, it was made to one who had no right to receive the money ; and secondly, the time of payment of the principal had not arrived. It is very clear that

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a tender of money before it is payable is invalid. It was contended by the counsel for the defendant, however, that this objection was waived, as it was not mentioned at the time. It is true that an objection is considered as waived when not explicitly stated, when it could have been obviated by the person making the tender, if he had been apprised of it; but the principle extends no further. In this case there was of course no power to remove or avoid the objection, if it had been mentioned.

Upon the whole, it seems to me that the entire principal was due at the time of the assignment to the plaintiff, and that such assignment is valid.

There must be the usual judgment of foreclosure for the entire principal, and the interest upon it from the date of the reassignment by the comptroller."

The defendants appealed from the judgment. The appeal was argued by

J. M. Van Cott, for the appellants.

S. E. Lyon, for the plaintiff.

By the Court, BROWN, J. The judgment of the court of appeals, in the suit originally instituted in the late court of chancery, between Minott Mitchell, complainant, and Miles Cook and Rhoda his wife, defendants, (a) is not a bar to this action. It is not an adjudication between the same parties for the same cause of action. The complainant failed upon his title to the subject in controversy, and not upon the merits, as against the defendants. The bill in that suit was filed by the same plaintiff, against the same defendants, to foreclose the same indenture of mortgage as in the present suit. The plaintiff also, in that action as in this, prosecuted as the assignee of the mortgage security, but the decree of this court was reversed upon the sole ground that Minott Mitchell was

(a) Reported in 3 *Selden*, 538.

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not the assignee, and could not maintain his suit in that character. He had furnished the circulating notes of the White Plains Bank, upon an agreement with Elisha Crawford, the mortgagee, that they were to be delivered to the comptroller of the state and the mortgage reassigned for his benefit. With these notes the reassignment was consummated, and the bond and mortgage delivered to Minott Mitchell as his own property. As the comptroller, however, held them under a special statute, for a special purpose, he could do no more than follow the express injunctions of the act and reassign to the person from whom he received them. The facts were not sufficient, in the opinion of the court of appeals, to constitute Minott Mitchell the owner of the bond and mortgage, in law or equity. This is all. The decree was reversed and the bill dismissed, because, without an assignment from Crawford, Minott Mitchell had no standing in court. Now when he reappears, with the bond and mortgage and the deed or deeds of assignment in his hands perfect and complete, it cannot be said that the question which he proposes to litigate is *res adjudicata*.

The judge at the special term found as a fact, that Elisha Crawford, the mortgagee, was an individual banker transacting business under the name and designation of the White Plains Bank. This is a material fact in the case; for if Richard Cadmus was the owner of the White Plains Bank, and the mortgage in question was part of its assets, the case would assume quite a different aspect. I do not see, however, that the court at special term could have reached any other conclusion. The documentary evidence derived from the bank department, the positive testimony of Elisha Crawford, the omission of Cadmus and his assignees to make any claim as owner or proprietor, without referring particularly to the other proof, could hardly leave a doubt of the fact found by the judge. It follows, as a result, that Crawford, and those who held the bank from him, had an undisputed right to assign and deliver the mortgage to Minott Mitchell. He had

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furnished the circulating notes upon the faith of the agreement that he was to become the owner of the mortgage. The agreement was so far executed that the notes were applied to the uses contemplated, and the bond and mortgage obtained and delivered over to him. And had he made the bank and Elisha Crawford parties to his bill in chancery, and framed it with a view to his equitable title as assignee, I can hardly doubt but that his claim to relief would have been affirmed.

The validity of the alleged payment of \$1000, made by Miles Cook on account of the mortgage, on the 1st January, 1846, and for which he holds the receipt of Richard Cadmus, the cashier, depends upon the authority of Cadmus to receive the money. The mortgage is dated on the 4th of September, 1844, and is made to secure the payment of \$1400, with the interest, seven years from the date. At the time the money was paid, the mortgage had been assigned to, and was then in the hands of, the comptroller. Of this transfer Cook had full notice, as appears by his written admission of the date of September 10th, 1844, which is amongst the exhibits. It was no part of the cashier's business to receive the principal moneys secured upon mortgages assigned to the comptroller to assure the redemption of the circulating notes of the bank. Whenever the notes were returned and the security reassigned, it became the property of Crawford, the mortgagee. And as cashier, even then I do not see how Cadmus could have legally accepted the money and discharged the mortgage, without special authority for that purpose. Crawford, as president of the bank, had power from the comptroller, given in pursuance of the 5th and 10th sections of the "act to authorize the business of banking," to receive the interest on the bonds and mortgages held for the bank. So Cadmus, by a like power from Crawford, the president, dated January the 21st, 1844, had authority to receive the interest. Cook could hardly have been deluded with the idea that he was making a valid payment upon the mortgage. He knew that neither

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Cadmus, nor the bank of which he was cashier, possessed the bond and mortgage. He knew that the money was not due, and that the sum paid was only a part of the sum secured. When Minott Mitchell advanced the money in the circulating notes of the bank, under the agreement with Crawford that he should receive the bond and mortgage from the comptroller, neither of them had notice, or was aware, that the payment had been made. Surely they are not bound by it. The subsequent tender of the balance of \$400, on account of the principal, could under no circumstances be available to discharge the lien of the mortgage, unless the \$1000 received by Cadmus was a valid payment.

I do not think it worth while to pursue the subject further. It was carefully and thoroughly examined, in all its aspects, by the judge at the special term, and his conclusions are in my judgment entirely right.

The judgment should be affirmed.

[DUTCHESS GENERAL TERM, May 9, 1859. *Brown, Davies and Clerke.* Justices.]

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THE PARISH OF BELLPORT, and EDMUND PETTY and others,
trustees of said parish, *vs.* SAMUEL TOOKER and others.

Upon the authority of *Robertson v. Bullions*, (1 Kern. 243,) the right of a majority of the corporators of a religious society to change their form of church government, and pass from a congregational church to an organization in connection with the presbyterian body, is unquestionable.

Where, in an action to recover the possession of a lot of land and a church edifice erected thereon, four of the persons named as plaintiffs, in connection with the religious corporation, and claiming to be trustees of such corporation, deduced their title to their office as trustees, from a meeting held by that portion of the corporators who adhered to the congregational organization, at which four trustees were elected—two to fill vacancies occasioned by the expiration of official terms, and two to supply the places of those who united with that part of the corporation in connection with the presbyterian organization—and from the time of their election to the commencement of the suit they had not had possession or control of the church edifice or corporate property, and except for a very brief season had been excluded there-

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from, and from the exercise of all functions, as officers of the corporation, and on the other hand the defendants deduced their title as trustees, by regular succession and election, from the time of the incorporation of the society down to the time of the commencement of the action; and during all this time they and their predecessors had been in the actual possession of the church edifice and property, holding it for the corporation and its members, and exercising without interruption the usual functions of corporation officers; *Held* that the defendants were the rightful trustees of the corporation. And it being manifest, from the pleadings, that the title to the lands and church edifice was not put in issue, nor the right to the possession, but only the title to the office of trustees of the religious corporation; *Held* further, that as soon as it appeared, upon the trial, that the defendants were in possession of the premises in dispute, holding them from the religious corporation under color of an election apparently regular, held in conformity with the statute, the plaintiff should have been nonsuited.

In an action of ejectment, brought in the name of a religious corporation and by persons claiming to be trustees of the corporation, to recover the church edifice and land, on the ground that the corporation is the owner in fee, and entitled to the possession, from which it has been wrongfully excluded by the defendants, the right to the office of trustees, as between the plaintiffs and defendants, cannot properly be entertained and determined.

No two issues can possibly be more incongruous than one upon the title of a corporation to a piece of land, and the title of a class of persons to administer its affairs as its directors and officers. *Per BROWN, J.*

The remedy for an intrusion into, and usurpation of, a public or corporate office, was an information in the nature of a *quo warranto*, filed by, and in the name of, the attorney general, upon his own relation, or upon the relation of a private party. The remedy is still substantially the same, under the code, except that it is an action in the place of an information, and is still brought by the attorney general. *Per BROWN, J.*

APPEAL from a judgment rendered at a special term. The action was brought to recover a lot of land and the meeting house thereon, situate at Bellport, in Suffolk county. The cause was tried at the Suffolk circuit, on the 4th of June, 1858, before EMOTT, justice, without a jury, by consent of parties. Judge Emott decided the cause in favor of the defendants, and gave the following opinion :

EMOTT, J. "This is an action of ejectment, brought by the individuals named as plaintiffs, together with the corporations which they claim to represent, against the defendants, for a lot of land and meeting house or church thereon. It is ad-

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mitted that the title to these premises is in the trustees of the corporation known as the Parish of Bellport, and the defendants do not make any claim adversely or in hostility to this title. They deny that they have ousted the corporation, or that they hold the land and building in question against it, but alleging that they are the actual trustees and officers of the society, deny that the plaintiffs are its trustees, or have ever been properly and legally chosen to the offices which they claim. The defendants also admitted, at the trial, that they were in possession of the premises, justifying their possession, as I have said, as trustees of this religious society. The issue raised by the pleadings, therefore, is the title of the defendants to be trustees of the corporation. It admits of a serious question, whether the respective rights of these two sets of persons claiming to be trustees can be determined in such an action as this, or whether the validity of either election can be examined in this collateral way. The proper method to bring such a question before the court is by *quo warranto*, and in any other proceeding, or at least in a suit like the present, the possession of either body of trustees, both of whom were elected under color of right, ought not to be disturbed. Such would seem to have been the rule of the older cases, founded upon very good reason. (*See opinion of Van Ness, J., in Jackson v. Nestles, 3 John. 133.*) This objection, however, has not been taken by the defendants, and possibly the fact that the corporation is nominally a party to this suit, together with the laxity and uncertainty as to all pleading and procedure, and the nature of actions, under our present system, may prevent the application of the rule. At all events, as both parties have elaborately presented their respective titles to the office of trustees, and invoke the judgment of the court, and as I have a clear opinion upon that point, I shall proceed to examine the question whether the plaintiffs or the defendants are trustees of the parish. I hope that I may thereby, at least, contribute something towards terminating, or removing from the courts, this un-

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happy controversy. From the evidence, it appears that in July, 1836, a congregational church was organized in the village of Bellport, its ecclesiastical officers chosen, and a minister invited to preach. There was then no church building or property, and no corporation to take or hold title to any. On the 8th day of March, 1843, the persons who were connected with this independent church organization and attendants upon its services, met, after notice given according to law, in the academy, where their services were held, and became incorporated as a religious society, under the act of 1813, by the name of the Parish of Bellport. Six trustees were elected, and the proper certificate made and filed. The property now in dispute was subsequently conveyed to the trustees of this corporation, and there was no dispute as to the persons holding this office, until the year 1852. Before this time, however, disputes had occurred in the society in respect to the employment of a preacher, and perhaps on other subjects, and a presbyterian party had grown up among them. In November, 1851, the trustees then in office called a meeting of the parish or society, to determine the denomination of the church. Before this meeting took place, a suit was commenced by three persons, members of the congregation and society, against four trustees then in office, and the corporation itself, alleging that the defendants had excluded them and their associates and the church and society from the use of the church building. After the complaint in this action was filed, the meeting called by the trustees took place, on the 28th of November. A majority of the persons then present voted in favor of connecting the church with the presbyterian body. There is some difference between the parties to the present suit, and some conflict in the evidence, as to whether those who participated in this meeting were all of them members of the society and entitled to vote. But there is no sufficient proof that this meeting was not legally called and legally conducted, as a parish meeting of the congregation or corporation. The effect of

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this action will be considered hereafter. After this meeting, and in January, 1852, a Presbyterian church was organized by the presbytery of Long Island, upon the formal request of certain of the attendants upon the services and members of the corporation of the Parish of Bellport. These persons took regular letters of dismission from the congregational church to the newly formed church or ecclesiastical body of presbyterians. A supplemental complaint was then filed in the suit of which I have been speaking, stating these additional facts and asking for a judgment, declaring that the then plaintiffs and their associates were the true church and corporation and entitled to the meeting house, and that the defendants were seceders and intruders. This was a contest for the property, between the adherents of the congregational church or religious organization, and the adherents of the presbyterian church, among those who had belonged, or did belong, to the parish. It was an attempt to remove into the courts, for settlement, the dispute which had been going on among themselves. The gravamen of the complaint in that case, that is, the principal act of the defendants which was complained of, was the exclusion from the meeting house of a clergyman employed by the congregational church or society, and the same person who preached in the church, and had been paid by the trustees regularly until September, 1851. This case was decided by the supreme court in favor of the defendants, on the ground that no breach of trust towards the corporation was shown sufficient to lay the ground of a suit against the trustees. This ground was taken both at the circuit and the general term, although it was reached and laid down somewhat differently at the trial and on the appeal.

On an appeal to the court of appeals the judgment was affirmed, and two opinions were delivered. One of these argues that the clergyman, whose exclusion was complained of, was not properly called, because he was invited or employed by the church or ecclesiastical body only, and not by the church and congregation. The other opinion puts the dispo-

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sition of the case on the doctrine enunciated in *Robertson v. Bullions*, (1 Kern. 243.) That doctrine, as applied by the learned judge to the case in hand, was, that the church or body of professing christians is entirely distinct from the ecclesiastical society formed under the act; that although the same persons belong to both, yet the law takes cognizance of their rights only as corporators and not as church members; and that no injury to the plaintiffs as corporators was shown, but only a failure to discriminate properly as to the ecclesiastical position of different corporators. It may be difficult to ascertain which of these opinions expresses the views of the court; but in the present case it is not very material to do so. The decision of that controversy does not dispose of this, whichever opinion is regarded as authoritative. The question here is purely as to the legal rights of the parties, a question which was not presented to, nor decided by, the court in the former suit. The plaintiffs in that action were defeated because they did not show any violation of any legal right in themselves, as corporators of the parish of Bellport, considered as a corporation. In the present case, on the other hand, is presented simply the question of the legal right of the plaintiffs or defendants to the office of trustees. In the opinion delivered by Judge Shankland, he uses this language: "In my judgment, it is clear that the meeting house and lot is the property of the congregational church and society, and not of the new church which was organized in 1851. At the time the deed was executed and the house built, no other church existed at Bellport but the independent church and society of Bellport. By no legal possibility, therefore, could a subsequently created church and society take any benefit under the deed." Again he says: "the vote of the congregation to call the meeting house a presbyterian house is of no avail. It gives no rights to the new presbyterian church in the said house, nor did it deprive the congregational church of any they previously possessed." If these statements are to be taken, literally,

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as the judgment of the court, looking at them apart from their connection, and without considering the other opinion in the case, they might seem to dispose of the whole matter in controversy between these parties. But I apprehend this would not be doing justice to the cause or the court. It is plain that such a proposition as is contained in the paragraphs which I have quoted, is not involved in the judgment of the court. That judgment was that the plaintiffs, who represented the congregational organization and party, were not entitled to the relief they asked against their opponents, the presbyterian party. This judgment rested on one of two reasons, as indicated in the two opinions given, either that Mr. Tomlinson, the minister who was excluded, was not regularly called or appointed to preach there, and therefore the defendants had a right to exclude him from the pulpit, which is Judge Shankland's view, or that his exclusion as a congregationalist, and the recognition of a presbyterian minister and his friends forming another portion of the corporation, was not an infringement of the legal rights of the corporators, but merely a failure to discriminate rightly as to the ecclesiastical position of different portions of the corporation. Either or both of these propositions may be considered to have been decided in the court of appeals, but clearly not the exclusive legal or equitable right to this property of either the presbyterian church and those adhering to it, or the congregational church and those composing it. But, with great respect for the learned judge, I think the reasoning of Judge Shankland rests upon an assumption, which is inconsistent not only with the views of Judge Johnson, in the opinion delivered by him, but with the doctrine of the case of *Robertson v. Bullions*, which is certainly a controlling authority upon questions of this nature. The assumption to which I refer, is the identity of the Parish of Bellport with the congregational church or society, which was organized there in 1836. If these two bodies are identically the same in law, not merely because the same persons composed each at their

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respective organizations, but because the Parish of Bellport was the congregational society of Bellport, without any legal distinction possible between them, that would go far to put an end to this controversy. But that is far from being the fact or the law, and the two bodies cannot be confounded without leading us into grave errors, especially in a controversy involving legal rights, and not the enforcement of any trust or equitable duty. The case of *Robertson v. Bullions*, as is said by Judge Johnson in *Reeve v. Post*, establishes that all the members of the society which is incorporated become a corporation, and not merely the trustees, as representing a church or ecclesiastical body; that this corporation is a lay corporation, and is entirely distinct from any purely spiritual, if it may be so styled, or ecclesiastical body. Even if the very same persons had from the outset composed the church and the corporation, yet the two bodies would continue distinct, and the rights of every individual member of both would be different, as referred to in his connection with one or the other. Judge Allen, in his opinion in *Robertson v. Bullions*, says: "The church proper, as a collective body of christians, who have made a public profession of the christian religion, and are united in fellowship and communion under the same pastor and form of church government, is entirely distinct from the ecclesiastical society framed under the act." The judgment in that case expressly decides, that where property was held by trustees for the benefit of an incorporated society, on special trusts for the exclusive benefit of those who adhered to a particular faith, if these very persons became incorporated and the property was conveyed unconditionally to the trustees of the corporation, these exclusive rights were surrendered, and the property became the property of the corporation, to be managed and controlled for the benefit of all who are recognized by the statute as its members. The rights of the members of a church, and the test of admission to those rights, can be settled by their own agreement; the rights of the corporation, and the test of

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membership of the corporation when it is formed, are prescribed by the statute.

It will be observed that the religious society, in the present case, was incorporated without any mention or assumption of any denominated name or preference. It is the parish of Bellport. Its members consist of the stated attendants upon the worship regularly conducted in such church, who have contributed to its support. Every such person, whether he be a member of the church organization or not, and whatever may be his denominational preferences or connections, is entitled to the rights of a corporator in this society. Judge Selden shows, by a convincing argument, in his opinion in *Robertson v. Bullions*, that neither the trustees of such a corporation, nor the corporation itself, can take or hold real estate upon a trust for the exclusive benefit of a portion of the corporators, of those only who continue to hold a particular creed, or adhere to a particular form of church government. When lands are conveyed as these were, to a religious society, incorporated under the statute, or to its trustees, unconditionally and simply, they must be held for the benefit, and subject to the control of, the majority of the corporators. They may not only select their officers, and thus control the property, but they may change their faith and their form of worship, or their discipline, at pleasure, and it is not in the power of the courts to interfere. In the strong language of Judge Selden, in the case just referred to: "It was the intention of the legislature, to place the control of the temporal affairs of these societies in the hands of a majority of the corporators, independent of priest or bishop, presbytery or synod, or other ecclesiastical judicatory." The courts are thus relieved in such cases of the interminable disputes growing out of religious differences among the members of such bodies, and the power over the church property is placed where it ought to be, in the hands of a majority of its owners. In the present case, the question whether the corporators who organized this parish, were all of them, or a majority of them, congregationalists, and whether

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the formation of a presbyterian church, or the adoption by a vote of the society, of the presbyterian name, or ecclesiastical connection, was a departure from the object of the founders of the parish, is irrelevant to the true issue. It can only have a bearing in one aspect of the case, that is, upon the question whether the persons who introduced this change, and still endeavor to adhere to the connection with the presbytery, have thereby ceased to be attendants upon the public worship of the parish, or society of which they were corporators. Such attendance, as well as a participation in the support of the minister, is required by the statute, as we have seen, as a qualification for voting and taking part in the concerns of the corporation. It becomes necessary to determine what worship, and by whom conducted, such persons are required to attend and support, in order to be and continue corporators. I think it is perfectly plain, that it is not worship or ordinances, celebrated in accordance with any particular profession of christianity. It is not the worship conducted by the minister of that denomination, or preaching those doctrines which were accepted by the founders, or original corporators of the society, or which are in accordance with its design or profession, or even its name. Such a view of the statute would be in obvious conflict with the eighth proposition adopted by the court of appeals, in *Robertson v. Bullions*, and which I have just cited, as well as with the whole doctrine of that and former cases. It is the worship conducted with the sanction of the officers of the society, and under the direction of a majority of its members, which is the public worship of the society. Such public worship is no less the public worship of the society, although it may proclaim different doctrines, or follow a different mode of worship from that of the founders of the church, provided it be statedly and regularly conducted according to the will of the society, which means the will of a majority of its members, regularly and duly ascertained and expressed. We are now prepared to consider the remaining facts of the case. It is upon the effect of a very few of these which occur-

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red immediately after the parish meeting in 1851, and the institution of a presbyterian church in January, 1852, that the whole controversy in the present case hinges. After the organization of this presbyterian church, the minister who was installed by the presbytery, continued to preach stately in the meeting house. The minister who had been employed by the congregational church, or by the society, or parish, previously, and down to the fall of the year 1851, also continued to preach, and hold separate services at a different hour. These two sets of services continued until about November, 1852, when a decision having been made in the supreme court, in the former suit, adverse to the plaintiffs in that suit, the trustees who had been chosen at the election, which the present defendants say was the regular election for that year, assumed entire control of the building, and excluded the congregational minister altogether from its use. In February, 1852, however, it will be seen, at the time for the annual election of trustees, there were two different clergymen conducting worship, at different hours of the day, on Sunday, in this church.

On the 21st day of February, an election was held pursuant to a notice which had been given in the manner prescribed by law, by the minister adhering to the presbyterian church, at public worship conducted by him. There is no objection made to this election, except that it was ordered by the trustees who adhered to the presbyterian church, notified at the worship conducted by their minister, and participated in by those who professedly were presbyterians, and attended the service of the presbyterian minister. Now I think the decision of the former case in the court of appeals, establishes at least that the Rev. Mr. Tomlinson, who preached to the congregationalists, was not the regularly called minister of the society, and was not entitled to exclusive recognition of himself, and his services as such. This proposition is distinctly negatived by both the judges who delivered opinions: by Judge Shankland, on the ground that he was not at that time properly settled or employed; and by Judge Johnson, because he holds

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that excluding him or interfering with his services, and substituting another minister, under the circumstances of the case, was not a violation of any rights of the corporators. I think the plaintiffs cannot contend since that decision, that the clergyman employed or sanctioned by the trustees, or a majority of them, was a mere intruder, with no color of right. The election itself was held as the statute directs, by the existing trustees; it is not alleged to have been unfairly conducted, no portion of the corporators was disfranchised or refused a vote, and no complaint is made of it, except that it was appointed and completed by those members of the corporation who had participated in the proceedings, which had resulted in the introduction of presbyterian preaching and worship; not, however, because the others were excluded, but because they refused to take a part. It is earnestly contended by the learned and experienced counsel for the plaintiffs that the proceedings of the parish meeting in November, and the consequent formation of the presbyterian church, were a secession from the society or parish, that is, from the corporation. After a careful consideration of his argument, I am convinced that he is under a mistake in this particular, and that the source of that mistake will be found in treating the congregational church, and the religious corporation, as identical. This error may have grown out of the doctrine originally put forth in the other suit, and which was held by many in the courts and the profession, until the decision of *Robertson v. Bullions*, that the trustees of such societies were the corporation, and that they held church property in trust for particular ecclesiastical organizations, or for the adherents of particular creeds or doctrines. We have seen that this construction is completely discarded, and that the question of membership of a religious society, must be settled according to the statute, and the rights of every member are equal. I do not discover any thing urged against the parish meeting of November 28th, 1851, except the action which was taken at it. It must have been properly called, and those who voted at it were, with possibly a few

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exceptions, legal voters in the parish. There was no attempt made to reconsider its action, or reverse its proceedings, and although the persons who are recorded as voting at this meeting, may not be an absolute majority, yet we can have no evidence that they were not. Those who did not see fit to attend must be bound by the action of those who did. The courts can receive no other evidence of the will and action of a majority of the society, than is afforded by a formal vote, regularly passed by a majority of those who attend its meetings. It is said that the action of this meeting could not affect the legal rights of the opponents of the change proposed, or of the congregational church. The congregational church, as such, had no legal rights. As to its members, and those who desired to continue in congregational fellowship, and to continue congregational worship in the church, it is unquestionably true that the action of this parish meeting could not affect their legal rights. It did not make them any the less members of the incorporated society, and entitled to a voice in its affairs. Nor did it, in my judgment, make those who participated in it, seceders or outcasts from the society. It would be difficult to show that any such vote of a majority of the members of such a corporation, at a properly called meeting of the body, could have that effect. I think this proceeding must be regarded as a resolution by a majority of this religious society at that time to abandon the congregation discipline, and adopt the faith and discipline of the presbyterians, and as a sanction and authority for the subsequent action of the trustees, in opening the church to presbyterian worship and preaching. Such a change it was clearly in the power of the majority of the society to make, just as it would be for the present plaintiffs and their friends, if they are in a majority, or can obtain a greater number of votes in the parish, to revert to congregationalism. These are questions of the will of a majority of those who belong to the corporation, to be determined at their meetings, and not questions of trusts for the courts. It follows that the trustees, in February, 1852, were at least justi

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fied in regarding the presbyterian worship and minister as the stated worship, and preacher of the society, and that the plaintiffs' objection to the election of trustees on the 21st of February, 1852, to which the defendants trace their title, is insufficient. But there are additional considerations of no slight weight, in deciding the controversy between these two sets of trustees. On the 24th of February, 1852, the other election of trustees was held, pursuant to an appointment by the two trustees who adhered to the congregational connection, and under a notice given at the public worship which this party kept up. At this election two person were voted for as trustees, to fill the places of those whose terms expired, and two others, to be trustees in the room of two who had yet some time to serve, but who having connected themselves with the presbyterian church, or favoring the presbyterian movement, were regarded by the congregational church as seceders from the society, and as having forfeited their offices *by refusing to act*.

This assumption was entirely unwarranted. The terms "refuse to act," used in section 6, probably refer to an original and continued refusal on the part of a person chosen trustee to accept the office. But even if they do not, the judgment in the former case of *Reed v. Post*, and the principle of the well reasoned case of *Robertson v. Bullions*, so often referred to, are conclusive that these trustees had been guilty of no acts which could forfeit either their corporate rights or their official position. This election was therefore entirely irregular in this particular. The parties conducting it took another step, which was the result of the error into which they have constantly fallen, and which, as I have endeavored to point out, is the fundamental fallacy of the present suit, that of confounding the congregational church and the incorporated parish. They excluded from voting all the pew-holders and attendants at the church who upheld

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the presbyterian party and worship. This cannot be justified upon any principle consistent with the settled doctrines of the courts, and the sound interpretation of the statute. It is not necessary now to say that the adherents of either of these ecclesiastical bodies, or attendants upon either worship, had exclusively the right to vote and act in the corporation and manage its concerns. It is sufficient to invalidate this election, that a withdrawal from the communion of the congregational church was not a withdrawal from this incorporated society, as long as the persons thus leaving their ecclesiastical connections continued to attend and support a public worship in the church which had the sanction and authority of its officers, and, as far as we can see, of a majority of its members. These persons might have made themselves amenable to ecclesiastical censures; they might have lost or abandoned their right of church membership, but they had not ceased to be members of the incorporated society, and could not rightfully be excluded from voting at its elections. For these reasons, the election held on the 24th of February, 1852, was irregular and invalid, and the subsequent elections down to that at which the present plaintiffs were chosen, held under the direction of persons claiming to be officers of the society, but who traced their title to this source, must fall with it.

Upon the whole, I have reached the clear conclusion that the election ordered by the trustees in office in February, 1852, or a majority of them, and which was held on the 21st of February, 1852, was legal and valid; that the persons who voted at that election were corporators and entitled to such vote, and that the trustees then elected, with those then in office, were the legal trustees of this corporation, and that their successors, the defendants, are now its actual trustees, and entitled to the possession of its property.

I think it will ultimately turn out that the ground upon

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which the battle is to be fought between the contending factions in this little church, is the voting ground of the society itself, the election of its trustees, and the resolutions of its members; and that the party which can control the greater number of votes, must triumph at last. It is a source of satisfaction to the courts to be relieved of such controversies. Our tribunals are no place for the determination of questions of religious doctrine and discipline, and in our day and country there is no decision of disputes which turn upon such questions, with which the public ought to be satisfied, but the action of the parties concerned themselves.

I am happy to be able to dispose of the present controversy satisfactorily to myself, upon a pure question of legal right, without deciding upon the theological orthodoxy or consistency of any of the parties before me.

I am satisfied that the defendants are the legal trustees of this parish, and are therefore entitled to judgment."

From the judgment entered at the special term, in accordance with the above opinion, the plaintiffs appealed.

George Miller, for the appellants.

W. P. Buffett, for the defendants.

By the Court, BROWN, J. The justice who tried this action at the special term pronounced with his decision an elaborate and carefully drawn opinion, which is decisive, I think, of all the questions involved in the controversy. It would be but a repetition of what he has already said, and a reiteration of arguments stated with clearness and precision, and which lead logically and necessarily to the conclusions at which he arrives, were I to enter at large upon

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a re-examination of the questions. The fallacy of the plaintiffs' case, if it be a fallacy, consists in the idea that pervades it throughout, that the religious corporation known as the Parish of Bellport, and the congregational church which they represent, are one and the same. Assuming, and I think it may be regarded as indisputable, that the congregation at Bellport, and from which all parties claim descent, was originally a congregational church, it by no means follows that it was to remain such through all time; and that the incorporators or congregation had no power to change its doctrine and discipline and profession of faith, or to place themselves in connection with any other religious body without a forfeiture of their property and franchises, and leaving them all to the absolute enjoyment and disposition of the minority, however small, who chose to adhere to the old forms of faith and church government. This view, doubtless, prevailed with the legal profession and the public, to some extent, until the learned and searching examination of the rights, duties and obligations of religious corporations formed under the act of 1813, by the court of appeals, reported in *Robertson v. Bullions*, (1 Kern. 243.) And I am not able to read the proceedings and testimony in this action, and resist the apprehension that the plaintiffs and their counsel shared in this mistaken opinion. The conclusions at which the learned judge (Selden) arrives in the case to which I refer, deserve to be remembered, because they cannot do less than remove from the tribunals of justice a fruitful and endless source of controversy and litigation upon the subject of church government, faith and religious belief, which the judges are not qualified by education and habits of thought to determine, and refers them for settlement to the individual conscience and judgment of those composing the corporate body. They are these: That a religious corporation, under the statute, consists not of the trustees alone, but of the members of the society. That the

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society itself is incorporated, and its members are the corporators. That the relation of the trustees to the society is not that of a private trustee to the *cestui que trust*, but they are its officers, with the powers of the officers of other corporations. That such societies do not belong to the class of ecclesiastical corporations, in the sense of the English law, but are to be regarded as civil corporations governed by the rules of the common law. That the trustees of a religious corporation cannot take a trust for the sole benefit of members of the church, as distinguished from other members of the congregation, nor for the benefit of any portion of the corporators to the exclusion of others. That the trustees of a religious corporation "cannot receive a trust limited to the support of a particular faith or a particular class of doctrines, for the reason that it is inconsistent with those provisions of the statute which give to a majority of the corporators, without regard to their religious tenets, the entire control over the revenues of the corporation." Upon the authority of this decision, the right of a majority of the corporators of the Parish of Bellport to change their form of church government and pass from a congregational church to an organization in connection with the presbyterian body, was unquestionable. And no other question remained for the determination of the judge, at the special term, but to ascertain who were the rightful trustees of the corporation of the Parish of Bellport—the persons named in connection with the corporation itself as plaintiffs in this action, or those named as defendants, if it was competent to determine that question in an action brought to recover possession of the corporate property. The weight of the evidence upon this point is with the defendants. Indeed there are some undisputed facts in the case, the force of which cannot be overcome by any considerations suggested upon the other side. The defendants deduce their title as trustees by regular succession and election, from the time of the incorporation of the society down to the time of the commencement of this action. During all this time they and their predecessors have been in the actual possession

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of the church edifice and property, holding it for the corporation and its members, and exercising without interruption the usual functions of corporation officers. On the other side, four of the persons named as plaintiffs, in connection with the corporation, deduce their title to their office as trustees, from a meeting held on the 24th February, 1852, by that part of the corporators who adhered to the congregational organization, at which four trustees were elected—two to fill vacancies occasioned by the expiration of the official terms of two of the trustees, and two to supply the places of those who united with that part of the corporation in connection with the presbyterian organization. From the time of their election to the time of the commencement of this action they have not had possession or control of the church edifice or corporate property, and except for a very brief season may be said to have been excluded therefrom, and from the exercise of all functions as officers of the corporation of the Parish of Bellport. The judge, therefore, could do no less, under the evidence, if he entertained the question at all, than to determine that the defendants were the rightful officers of the corporation of the Parish of Bellport.

I think it right, however, to consider, very briefly, whether the right to the office of trustees could properly be entertained and determined in this action. In form and in substance it is an action of ejectment, brought to recover the church edifice and lands mentioned in the complaint, upon the ground that the corporation known as the Parish of Bellport is the owner in fee, and entitled to the possession from which it has been wrongfully excluded by the defendants. The prayer of the complaint is that the plaintiffs may be adjudged to be the owners of the premises claimed, in fee simple, and may recover the possession of the same against the defendants, with damages, &c. The title and right of possession is said to be in the corporation; and if the real purpose was to try the title and recover the possession, the action should have been brought in the corporate name alone, and the sole issue would have

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been upon the title of the corporation, and whether the defendants had wrongfully withheld from it the possession. This would have been a simple issue, and the proof would have followed the allegations of the complaint. Now, however, we have as plaintiffs, in addition to the church corporation, the six congregational trustees, and they propose, in addition to trying the title to the lands, to try also the title to the office of corporate trustees, and that too in the absence of any allegation that the plaintiffs are wrongfully excluded therefrom, or that the defendants have wrongfully intruded themselves therein. The answer denies that the plaintiffs Edmund Petty, Alfred Petty, William C. Beal, Charles N. Homan, Nathaniel Reeve and William A. Homan are the trustees of the Parish of Bellport; denies that the defendants withhold the possession, but says and insists that they, the defendants, are the trustees of the Parish of Bellport, and as such hold the premises as the property of the corporation, and for the use and enjoyment of the corporators as a place of religious worship, without excluding the plaintiffs or any other person therefrom. It is manifest that the title to the lands and church edifice is not put in issue, nor the right to the possession, but the title only to the office of trustees of the religious corporation. No two issues can possibly be more incongruous than one upon the title of a corporation to a piece of land, and the title of a class of persons to administer its affairs as its directors and officers. The remedy for an intrusion into, and usurpation of, a public or corporate office was an information in the nature of a *quo warranto*, filed by and in the name of the attorney general, upon his own relation, or upon the relation of a private party. The pleadings put the right directly in issue and judgment was rendered upon the right of the defendant, and also upon the right of the person averred to be entitled. (3 *Black. Com.* 262. 2 *R. S.* 2d ed. 482.) The remedy is still substantially the same, under the code, except that it is an action in place of an information, and is still brought by the attorney general. (*Code*,

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title 13, ch. 2.) If the plaintiffs can prevail in this action, the result will be equivalent to a judgment of ouster in the old proceeding by information in the nature of *quo warranto*. It will not be worth while hereafter to resort to the substitute for that remedy provided by the code to try the title to an office. An action of ejectment for the corporate lands, or an action to recover possession of its personal estate, will bring up for trial and determination the regularity of the election of its officers and directors and their title to administer its functions. *Jackson v. Nestles* (3 John. 115) was an action of ejectment to recover the possession of certain lands upon a tract called the Glebe, in the town of Newburgh. The title was vested in the trustees of the Parish of Newburgh, and the lessors of the plaintiff endeavored on the trial to try the question of title to the office of trustees. Upon the motion to set aside the nonsuit and for a new trial, Mr. Justice Van Ness says: "The trustees of the Parish of Newburgh are a body corporate, and it is taken for granted, on all hands, that the title to the lands in controversy is vested in that corporation or those claiming under it; and in my view of the subject the only question presented by the case is, who are the members composing the corporation. To determine that question, the counsel on both sides have proceeded on the idea that a decision as to the validity of one, or both, the elections of trustees is necessarily involved. I think differently. The question, in this action is not who are the trustees *de jure*, but who are the trustees *de facto*. As long as the conflicting claims of these different sets of trustees, both elected under color of right, to the exercise of the corporate rights remains undetermined, so long the possessions held under either ought not to be disturbed. I am satisfied that in the present suit these claims cannot be tried. The only way in which the legality and regularity of these elections can be settled is by information in the nature of *quo warranto*, under our statute. This is the appropriate remedy in all cases of contested corporation elections, and either of the parties may resort to it

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to have their rights fully investigated and finally determined." This case, it will be observed, is similar in most respects to that under consideration; and upon its authority, as well as upon principle, I think that as soon as it appeared upon the trial that the defendants were in possession of the premises in dispute, holding them for the religious corporation of Bellport, under color of an election apparently regular, held in conformity with the statute, the plaintiffs should have been nonsuited.

For these reasons I think the judgment should be affirmed.

[DUTCHESS GENERAL TERM, May 9, 1859. *Lott, Emott and Brown, Justices.*]

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A debt secured by a sealed mortgage, and an unsealed note instead of a bond, may be enforced by a foreclosure of the mortgage, after the expiration of six but before the expiration of twenty years from the time when the debt became due.

The lapse of six years since the maturity of the note, without any subsequent recognition or acknowledgment of the debt, is not conclusive evidence that the mortgage has been paid.

The provision of the statute of limitations, making the lapse of six years a bar, in such a case, is in terms confined to an action *at law* on the *note*; and does not operate to defeat a remedy on the *mortgage*, by which a court of equity cuts off the equity of redemption.

THIS was an action to foreclose a mortgage upon premises in Greene county, dated February 5, 1835, executed and delivered by the defendant, William T. Huggins, to Joseph Huggins, to secure the sum of \$250, payable on the 1st of February, 1836, and assigned by the latter to the plaintiff, on the 14th of March, 1836. The mortgage was on the same day acknowledged, and on the 9th day of February recorded in the clerk's office of the county of Greene. Contemporaneously with the mortgage, and to secure the same debt, Wil-

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liam T. Huggins executed and delivered to said Joseph Huggins a promissory note of like date, amount and time of payment as the mortgage, and payable to Joseph Huggins or bearer. The mortgage was under seal, and the note was not under seal. The defendants, among other things, averred that the note was paid and satisfied, and also that the note (and consequently the mortgage) was barred by the statute of limitations, by the failure to commence an action thereon within six years after the cause of action accrued. The action was commenced on the 6th day of September, 1855. The cause was tried by the Hon. DEODATUS WRIGHT, then a justice of the supreme court, without a jury, at a circuit court held in the county of Greene, in November, 1857. Evidence was given tending to show the consideration and object of the bond and mortgage, and on the part of the defendants, to show that they were satisfied and paid; and on the part of the plaintiff, that an unpaid amount of about \$70 remained due thereon. The justice came to a conclusion favorable to the plaintiff on the latter point, he finding that a portion of the amount secured by the mortgage was still due and unpaid; but holding, also, that the right to recover was barred by the statute of limitations, he gave judgment for the defendants, with costs; from which judgment the plaintiff, having duly excepted to the rulings of the judge, appealed to the general term. The remaining facts, so far as they are material, sufficiently appear in the opinions which follow.

King & Mattoon, for the appellant. I. The cause of action having accrued prior to the adoption of the code, the law limiting actions, as it existed before the code, governs the case. (*Code*, § 73.) Actions on sealed instruments are barred after twenty years. (2 *R. S.* p. 398, § 48, 3d ed.) On instruments not under seal, after six years. (*Id.* 394, § 18.)

II. The mortgage is signed by the defendant, William T. Huggins. It provides for the payment of the money on the same terms named in the note, and secures its payment by a

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conveyance of the land. Therefore the note should be deemed the same as if incorporated in the mortgage, and a part of it, and the right of action against both the person and the land follows the sealed mortgage. The seal on the mortgage repels the presumption that the note is paid.

III. If the plaintiff's remedy against the person, on the note is gone, certainly his remedy against the land remains. The mortgage gives a perfect remedy against the land for the moneys secured by it, and being under seal, the plaintiff's action on it is not barred till after twenty years. This view is sustained by the supreme court of the United States, and in every state where the question has arisen, except in 7 *Wend.* 94. "Where a deed of trust was executed to secure the payment of certain notes, and a judgment obtained on the notes, the judgment did not operate as an extinguishment of the right of the holders of the note to call for the execution of the trust, although the act of limitation might apply to the judgment." (*Bank of Metropolis v. Guttschlick*, 14 *Peters*, 19. Also *Eastman v. Foster*, 8 *Metc.* 535. 2 *Cox's Ch. Cas.* 125. 2 *Hilliard on Mort.* 21.) In the case of a mortgage of real estate to secure the payment of a promissory note, although the note be barred by the statute of limitations, yet if it has not been paid, the mortgagee has his remedy on the mortgage. (*Thayer v. Mann*, 19 *Pick.* 535. Also see cases cited in this last case.) The general rule, that a discharge of the debt discharges the mortgage deed by which it is secured, does not apply where the debt is merely barred by the statute of limitations. (*Bush v. Cooper*, 26 *Miss.* (4 *Cush.*) 599. Also 14 *B. Monroe's R. (Ky.)* 307.)

IV. The presumption of payment from lapse of time, is not a fixed or universal presumption. It cannot be used as the foundation of an action. (*Morey v. Farmers' Loan and Trust Co.*, 14 *N. Y. R.* 302.) It yields to a legal lien upon lands, as in the case of a docketed justice's judgment under the law prior to 1848. (*Waltermire v. Westover*, 14 *N. Y. R.* 16.) The case of *Jackson v. Sackett* (7 *Wend.* 94) was repudiated

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as an authority by Chancellor Walworth, in *Heyer v. Pruyn*, (7 Paige, 465.)

V. Though the holder of a bond and mortgage discharge the mortgagor from his personal liability on the bond, the remedy remains perfect against the land, under the mortgage. What greater effect can the statute of limitations have, than discharge the remedy on the note and leave it perfect on a sealed mortgage? Suppose a note and bond be given by the same person for the same debt, and executed at the same time, and more than six years elapse after the right of action accrues on the note, how could the presumption that the note was paid, work a presumption that the sealed bond was also paid? The maker of the note and mortgage in this case fixed the time within which the right of action on each of them could be enforced.

D. K. Olney, for the defendants. I. There is not a particle of evidence to show that the defendant has recognized the note or mortgage since the transfer thereof to the plaintiff, in March, 1836, between nineteen and twenty years after the note and mortgage purport to have become due. The answers set up payment, and the statute of limitations; also that the note and mortgage were executed to secure Joseph Huggins for a contingent liability on which he never had any thing to pay. The statute of limitations is an available answer in equity as well as at law. (*Lansing v. Starr*, 2 John. Ch. 150.) *Kane v. Bloodgood*, 7 id. 90. *Rosevelt v. Mark*, 6 id. 266. *Souzer v. De Meyer*, 2 Paige, 575. *Bedford v. Brady*, 10 Yerger, 350. *Walker v. Smith*, 8 id. 238.)

II. The principal instrument, the note, cannot be enforced, and the mortgage being collateral and incident to it, must fail with the note. Until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action. It is but an *incident* attached to the debt, and in reason and propriety it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt,

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is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond. (*Jackson v. Willard*, 4 *John*. 41, 43.) The debt is the principal, and the mortgage but an accessory, which cannot exist as an independent debt. (*Jackson v. Blodget*, 5 *Cowen*, 202. *Green v. Hart*, 1 *John*. 580.) Payment of the debt is an extinguishment of the mortgage. (4 *John*. above cited. *Lane v. Shears*, 1 *Wend*. 433, 437.) The above cases hold that the mortgage is a mere incident to the note or debt, and that a discharge of the debt, even by parol, is considered as a discharge of the mortgage. Where ejectionment is brought on a mortgage executed as collateral security for the payment of a sum of money secured to be paid by a note, it seems, in analogy to the principle which authorizes the presumption of payment after the lapse of twenty years without recognition of the debt, that the note may be presumed to be paid after the lapse of six years without such recognition. (*Jackson ex dem. Sackett v. Sackett*, 7 *Wend*. 94.) The fact that more than 20 years had elapsed since the giving of the bond or any acknowledgment of it, would be competent evidence of such payment, unless repelled, and defeat the action. (12 *John*. 242. 3 *John*. Ch. 135. 4 *Cranch*, 415.) And I perceive no reason why the same principle should not be applied where the mortgage is given to secure a note. The principle is perfectly well established, that the mortgage is but an incident to the debt. (7 *Wend*. 98, per *Sutherland, J.*) And the payment of the debt *per se* annihilates the mortgage. Here it is held that the debt is to be presumed to be paid.

III. If the land has been conveyed by the mortgagor to a third person subject to the mortgage, which the purchaser agrees to pay, in such case the land becomes the primary fund with which to pay the mortgage. Hence the distinction between the cases in 7 *Wend*. 94, above, and the case of *Heyer v. Pruyn*, (7 *Paige*, 470.) In the latter case the mortgaged premises had been conveyed, subject to the mortgage, and had

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by that means become the primary fund. The remarks of the chancellor, intimating a different doctrine than that contained in 7 *Wendell*, were unnecessary to the decision of the case, on account of the above distinction. This distinction runs through all the cases. (*McKinstry v. Curtis*, 10 *Paige*, 503. *Russell v. Allen and others*, *id.* 249. *Vanderkemp and Van Hall v. Shelton*, 11 *id.* 28.) Where the land is expressly conveyed, subject to the mortgage therein, the land is the primary fund, as between the grantor and grantee, and those deriving title from the grantee for the payment of the mortgage debt. (*Jumel v. Jumel*, 7 *Paige* 591. *Willard's Eq. Jur.* 453.) But if no equitable circumstances intervene, the debt is considered the *principal*, and the mortgage the security. (*Willard's Eq. Jur.* 453.) In this case there is no evidence showing any acknowledgment of the debt or the payment of any part of the principal or interest, or *promise* to pay, for nearly 20 years. The presumptive bar has not been repelled. The statute is a bar to the plaintiff's right to recover on the note. By analogy to the statute of limitations barring a right of entry after 20 years' enjoyment, a possession of that length of time by the mortgagee, without account or acknowledgment, forms a presumptive bar to the equity of redemption. (*Cowen & Hill's Notes to Phil. Ev.* 319.)

HOGEBOM, J. The facts of this case lie within a narrow compass. The plaintiff, by action commenced in 1855, seeks to foreclose a mortgage under seal, executed in 1835, for a debt falling due in 1836, which mortgage was accompanied by a promissory (unsealed) note to secure the same debt. The mortgage contains no *covenant* to pay, but the condition is that the instrument shall be void, if the above sum, with interest, is paid on the 1st of February, 1836, "in the manner particularly specified in the condition of his (the mortgagor's) certain bond or obligation bearing even date herewith." The mortgage was duly acknowledged and recorded. The answers interposed several defenses; and among others, the defense

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of payment; and that the plaintiff's cause of action was barred by the statute of limitations, in consequence of its not accruing within six years before suit brought. The justice before whom the cause was tried, without a jury, came to the conclusion, upon the evidence, that there was an unpaid balance due on the note, and that he should have given judgment for the plaintiff, but for the fact that more than six years had elapsed since the said note became due, and the cause of action thereon accrued prior to the commencement of this suit; and for that reason he gave judgment for the defendants. The case therefore presents the question, whether a debt secured by a sealed mortgage and an unsealed note can be enforced by a foreclosure of the mortgage, after the expiration of six but before the expiration of twenty years from the time when the debt became due. As has been said, there is no covenant in the mortgage to pay the debt; but at the same time the debt, its amount and the time of payment, are specified in the mortgage; and it is provided that in case "default shall be made in the payment of all or any part of the said principal sum of two hundred and fifty dollars, or the interest thereof, at the time or times when the same ought to be paid as aforesaid, that then, and in such case," the mortgagee may sell and dispose of the premises, &c. The true question, therefore, would seem to be, has the mortgage been *paid*? or, rather, in this case, is the lapse of six years since the maturity of the note, without any subsequent recognition or acknowledgment of the debt, *conclusive* evidence of payment? The justice trying the cause has come to the conclusion, upon the evidence, that a part of the debt is actually unpaid. Is there a legal *bar* to giving effect to that conclusion by rendering judgment for the plaintiff, in consequence of the lapse of time before mentioned. If this is substantially an action upon the note, then it is barred, for it is an action upon simple contract, and must be brought within six years. (*Code*, § 90.) And the plaintiff in such case fails, not because the debt is in fact shown to be paid, but because the law forbids

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the action. The *remedy* is taken away. But this is not in terms or effect an action upon the *note*. The mortgage would be good without the note. If there had been no note, but only the evidence of the debt recognized in the mortgage, is there any doubt that the mortgage could have been enforced after the debt became due, and for twenty years afterwards? The only question would be, was there a debt remaining unpaid—a security upon real estate—and was the lien enforced during the period that the law gives it legal existence. The additional recognition of the debt, in the shape of a promissory note, ought not to detract from its force. It is said that the note is the *principal*, and the mortgage only the *incident*; that is, that it is given only as a security for the note. In a certain sense, this is true. But in fact the *debt* itself is the principal thing, and the note is one form of *security* for, or evidence of, the debt, and the mortgage another. Suppose the mortgage contained a covenant to pay the debt, would it be any the less the principal thing than the note? True, the note (if negotiable) would have some facilities for an easy transfer, and might be negotiated independent of the mortgage. If so transferred, it would in law carry the mortgage with it, and so would the mortgage carry the note with it. The payment of either would be the payment of the other, except so far as a *bona fide* holder of the note for value is concerned, who might, under the law applicable to commercial paper, be protected. It is said that the note, from the lapse of time, is presumed to be paid. Not altogether so; for the law allows a suit upon it, and a recovery, unless the statute of limitations is pleaded. It is therefore, at most, but a presumption; suffered to be overthrown, it is true, only in one way, and that is, by proof of payment thereon, or recognition thereof, in the way pointed out in the statute. This, however, as before stated, only acts upon the remedy. It is an arbitrary and an artificial rule, not to be carried, I think, beyond the well-defined limits of the statute itself. The case of *Jackson v. Sackett*, (7 Wend. 94,) is much relied on as deci-

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sive authority in support of the bar. That was ejectment upon a forfeited mortgage, secured also by a note. The tenor of Mr. Justice Sutherland's able opinion is towards regarding the lapse of six years, unexplained, as sufficient evidence of payment. But he held that the bar was not absolute, and that circumstances tending to show that the note was unpaid were proper for the consideration of the jury, and a new trial was in fact granted for withdrawing the case from the jury. We are not precisely apprised by the case at bar what circumstances here exist; but we are told in the case itself that the plaintiff gave evidence "tending to show that there was due upon the mortgage about the sum of \$70; that no part of the said sum, or the interest thereon, had been paid." And the judge also says, "I am entirely satisfied from the evidence that there is an unpaid balance due on the note, and should have decided in the plaintiff's favor, except for the legal bar above stated." The late chancellor (Walworth) doubts, and even denies, the authority of the last cited case, in *Heyer v. Pruyn*, (7 Paige, 465,) and goes so far as to say that it "cannot be law." The cases in Massachusetts and Connecticut, and one in Kentucky, hold that notwithstanding that "the note may be barred by the statute of limitations, yet if it has not been paid, the mortgagee has his remedy on the mortgage." (*Thayer v. Mann*, 19 Pick. 535. *Bush v. Cooper*, 26 Mass. (4 Cush.) 599. *Eastman v. Foster*, 8 Metc. 535. *Baldwin v. Norton*, 2 Conn. 163. 14 B. Monroe (Kentucky) 307. See also 2 Cox's Chancery Cases, 125; *Spears v. Hartly*, 3 Esp. R. 81, 2; *Hilliard on Mortgages*, 21, 22.) The case of the *Bank of the Metropolis v. Guttschlick*, (14 Peters, 19,) declares a kindred and nearly analogous principle. The case of *Waltermire v. Westover* (14 N. Y. R. 16) has also, particularly in the reasoning of Mr. Justice Selden, some bearing upon the present case. In that case the lien of a justice's judgment, which according to the statute would be barred after six years for the purpose of bringing an action thereon, was, when a transcript was filed in the county clerk's

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office, recognized as of equal validity and duration with that of a judgment originally entered in the common pleas, and extended to ten years as against subsequent creditors. It is true, much stress was laid upon the language of the statute giving such a judgment the same force and *effect* as a judgment of the common pleas, but much stress was also laid upon the fact that there was nothing to prevent the enforcement of such a lien, except the language of the law of limitations; and it was considered that that language might be appropriately limited to cases directly within its terms; that there was reason for saying that the debt still remained, notwithstanding the statute had cut off the *remedy* when resorted to in the shape of an action. A distinction was drawn between the institution of a suit upon the justice's judgment and the enforcement of it as a lien upon real estate; and I think here a distinction may be drawn between an action upon the note for the purpose of enforcing a personal liability, and an action upon the mortgage for the purpose of enforcing the lien upon the real estate. This question, in this state, may be said to be nearly *res nova*, and I feel authorized to follow the weight of judicial authority elsewhere, resting as I think it does upon principle, especially as the case in 7th Wendell is not directly hostile to the rule here suggested. The judgment should be reversed, and a new trial granted, with costs to abide the event.

GOULD, J. At the December term, 1858, this case was submitted upon briefs, without oral argument. And on that submission I wrote this brief opinion:

The mortgage is defeasible *on condition* that \$250 be paid. The statute of limitations effects not the *right to the money* but the *remedy* therefor. It says to the creditor, not "you are paid;" but, "you cannot call on a court of law to *enforce payment.*" And the defense in this case is, not that the mortgagor has complied with the condition; but that, if he were sued *at law on the note*, the statute of limitations could

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be interposed as a legal bar to a recovery. Very true; but he is not sued on the note; and the plea (by answer) does not pretend that he has performed the condition; which, and which only, would defeat the mortgage-title. He does not bring himself within the equity of the defeasance; and the title remains good, under seal, it is asserted, within twenty years, and it can be defeated only according to the tenor of the defeasance. This view is sustained in *Heyer v. Pruyn*, (7 *Paige*, 470,) and is precisely and very satisfactorily covered by the case of *Thayer v. Mann*, (19 *Pick.* 535.) There should be a new trial.

As this opinion was thought to overrule the case of *Jackson v. Sackett*, (7 *Wend.* 94,) my associates deemed it best to have a full argument before coming to such a result; and on such argument it now comes up.

My views remain unchanged; and though it is rather difficult to say what the case of *Jackson v. Sackett* did decide, still, if to order a new trial in this case, that case must be reversed, I should order the new trial. That case founds its reasoning on the basis that the statute of limitations is a defense, because the law, from lapse of time, presumes payment. I do not so understand the statute of limitations. I understand mere lapse of time to be a full defense, because the statute says so: "*Ita lex scripta;*" and there is need of no such presumption to help out an absolute rule. But that case departs from its premise, of presumption of payment being merely the basis of a positive statute bar, when it says, (at p. 100,) "but the presumption arising from lapse of time is but *evidence* to the jury, from which they *may* infer that the debt has been satisfied." This, though true on a question of fact, (as to actual payment,) cannot be said of a legal presumption arising from an admitted fact. The lapse of time was either a bar, or no bar. If, by the statute, a bar, it needed no help from presumption. If not, by the statute, a bar, no presumption could help it.

But since my first opinion was written, there has been pub-

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lished a decision, (given indeed in 1857, but not then printed,) by which the court of appeals clearly takes the view that I did. (*Waltermire v. Westover*, 4 Kern. 16.) At page 20, "such statutes act upon the *remedy* merely, and not upon the debt." And at pages 21, 2, "If statutes of limitation do not discharge the debt, but act exclusively upon the remedy, upon what principle of interpretation is it to be held that this statute, which is in terms confined to the remedy by action, operates to annihilate a remedy by execution? The statute does not operate by producing any presumption of payment; but is a mere statutory bar, founded in principles of public policy."

In the case before us, the statute of limitations (where it speaks of the lapse of six years as a bar) is in terms confined to an action at law on the note; and cannot operate to annihilate a remedy *on the mortgage*, by which a court of equity cuts off the equity of redemption. The decision in *4th Kernan* is abundant authority for ordering a new trial in this case.

The judgment of the circuit court should be reversed, and a new trial ordered; costs to abide the event.

WRIGHT J., concurred.

New trial granted.

[ALBANY GENERAL TERM, May 2, 1859. *Wright, Gould and Hogeboom, Justices.*]

SLAMAN *vs.* BUCKLEY.

Where an action was brought, in a justice's court, for taking personal property, and the defendant put in an answer containing a general denial, and the justice, in his return, stated that he entered "judgment for damages, with costs, \$2.74," without stating in whose favor; *Held* that it was to be inferred, from the return, that the justice rendered judgment against the defendant, for some amount of damages, with \$2.74 costs; no claim being alleged or proved, to authorize the justice to award damages to the defendant.

Held also, that if the judgment was in reality for the defendant, the plaintiff should have procured an amended return to show that fact.

THIS action originated in a justice's court. The complaint charged the defendant with taking a wagon and part of a harness from the plaintiff's barn, without his consent, in the fall of 1856; and that the wagon was returned broken; but that the part of the harness taken, was never returned. The answer was a general denial of each and every allegation contained in the complaint. The action was tried without a jury. The only statement in the justice's return, from which it can be ascertained what judgment he rendered, is in these words, namely: "The case was submitted on the 12th day of June, and on the 15th day of June I entered in my docket judgment for damages, with costs, \$2.74." The plaintiff appealed from the judgment to the Chemung county court, where it was reversed, and judgment was rendered against the defendant for \$34.61 costs. The defendant appealed from that judgment to this court. All other facts necessary to a correct understanding of the decision of this court, are contained in the following opinion.

F. Phelps, for the plaintiff.

Jackson & Mead, for the defendant.

By the Court, BALCOM, J. I am of the opinion the justice's return shows that he rendered a judgment against the

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defendant for some amount of damages, with \$2.74 costs. This is the only legitimate inference that can be drawn from the return. No claim was alleged, or proved, to authorize the justice to award damages to the defendant. The plaintiff, only, could recover damages, under the pleadings. No presumption, therefore, can be indulged that the justice rendered a judgment for *damages* in favor of the defendant. If the plaintiff was in reality beaten by the justice, he should have procured an amended return to show that fact. Not having done so, the judgment must be regarded as given in his favor for some amount of damages not stated.

It cannot be said that no judgment was rendered by the justice which could be affirmed or reversed by the county court, as is argued by the defendant's counsel, on the authority of *Nellis v. Turner*, (4 *Denio*, 553.)

A party may have a judgment of a justice of the peace, in his own favor, reversed, when he has recovered a less sum than the evidence shows he was entitled to. (*Bissell v. Marshall*, 6 *John*. 100.) But in this case it is impossible to ascertain, from the return of the justice, what amount of damages the plaintiff recovered; hence, the county court could not say the judgment of the justice was too small.

If the justice erred in permitting the defendant to prove he said to the plaintiff's servant, when he got the wagon, in the absence of the plaintiff, that he had spoken to the plaintiff about the wagon, and it would be all right, the error should be disregarded, as there is no data in the case from which to infer that it affected the merits. (*Code*, § 366.) For aught that appears, the plaintiff recovered all the damages the evidence authorized. But I am of the opinion, what the defendant said, when he got the wagon, was admissible as part of the *res gestæ*; and that therefore the justice committed no error prejudicial to the plaintiff, in receiving it. (See 1 *Greenl. Ev.* § 108; *Cowen & Hill's Notes*, 592 to 606; 1 *Denio*, 141; 9 *Barb.* 271.)

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For the foregoing reasons the judgment of the county court should be reversed, and that of the justice affirmed with costs.

Decision accordingly.

[CHENANGO GENERAL TERM, May 10, 1859. *Mason, Balcom and Campbell, Justices.*]

BECKWITH vs. J. and E. GRISWOLD.

Every continuance of a nuisance is a fresh nuisance, and entitles the party injured to sue for damages.

A recovery, in an action for changing the channel of a creek and diverting the water thereof by means of obstructions, so as to flow the plaintiff's lands, is no bar to a subsequent suit to recover damages for a similar injury, sustained since the commencement of the former suit. And this, although the complaint in the second suit does not refer to the former suit, or claim damages for *continuing* the obstruction or nuisance.

The recovery in the second suit will be limited to the damages sustained by the plaintiff since the commencement of the former suit; and the complaint, if defective, may be amended on the trial.

ON the 11th day of April, 1850, the plaintiff commenced an action, in this court, against the defendants, for changing the channel of Seely creek, and diverting the water thereof, by means of obstructions placed therein by the defendants, from its natural channel, in Southport, in the county of Chemung, so that the water of said creek, when high, flowed lands of the plaintiff in that town, and greatly injured them. That action was tried at the Chemung circuit in September, 1850, when the plaintiff obtained a verdict for \$190 damages; on which verdict judgment was rendered in his favor, against the defendants, with costs.

On the 28th day of July, 1852, the plaintiff commenced this action; in which he complained that the defendants, by labor performed by them and their servants, at various times within ten years before that time, so changed the channel of

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Seely creek, in the said town of Southport, and so diverted the water of said creek from its natural channel, that the water of said creek, when high, did then flow, and had for a long time flowed, lands of the plaintiff situated in said town, and that such flowing had greatly injured them.

The defendants answered the complaint in this action; first, by denying the allegations therein contained; and secondly, by setting up the recovery and judgment in said first mentioned action as a bar to the cause or causes of action set out in said complaint.

This action was tried at the Chemung circuit in September, 1855, before Mr. Justice SHANKLAND, without a jury. It was shown that the changes made in the channel of the creek, or obstructions placed therein by the defendants, which caused the injury to the plaintiff's lands, for which he recovered in the first mentioned action in 1850, were the same that caused the injury to his lands after that action was commenced, and of which he complained in this action; and that each action was brought for injuring the same lands.

The defendants' counsel insisted, upon the trial, that the recovery and judgment in the first action were a bar to this action, because this action, "as set out in plaintiff's complaint, was for the erection of obstructions, or a nuisance, in Seely creek, and not for the continuation of such obstruction or nuisance." He also insisted that the plaintiff was seeking to recover damages a second time for the same cause of action. And he moved for a nonsuit, which the judge refused to grant.

The judge decided that the plaintiff could not recover in this action, any damages which he sustained prior to the commencement of the first action; but that he could recover in this action for all damages he sustained after the first action was commenced, down to the time this one was commenced, and he assessed such damages at \$100. He held that the variance between the allegations of the complaint and the proofs, was immaterial; and directed that the complaint be

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amended, so as to charge the maintenance and continuance by the defendants of the obstructions, artificial channel and diversion of the water of the creek, from and after the commencement of the first action, and so as not to claim for damages sustained prior to that time.

The defendants' counsel took exceptions to such decisions.

Judgment was rendered upon the said findings of Justice SHANKLAND, against the defendants, for \$100 damages, besides costs ; and they appealed from such judgment to the general term of the court.

S. G. Hathaway, Jr., for the plaintiff.

George Sidney Camp, for the defendants.

By the Court, BALCOM, J. The defendants' counsel claims that the allegations of the cause of action in the complaint were unproved in their entire scope and meaning, and that there was a failure of proof, which entitled the defendants to a nonsuit, by virtue of section 171 of the code. This is not so. The complaint not only states facts sufficient to constitute the cause of action for which the plaintiff recovered in this case, but also enough to constitute the cause of action for which he recovered in the first suit he brought against the defendants.

The plaintiff recovered damages in the first suit for erecting and continuing the obstructions in the channel of the creek, by the defendants, to the time he commenced that suit ; and he has only recovered damages in this action for continuing such obstructions from the time the first suit was commenced to the time of the commencement of this one.

It would certainly have been more lawyer-like if the plaintiff's attorney had alleged, in the complaint in this action, the bringing of the first suit and the recovery therein, and the wrongful continuance of the obstructions in the channel of the creek thereafter, by the defendants, and only claimed

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damages for such continuance. (*See Yates' Pl. 521; 2 Chit. Pl. 333.*) But that was not absolutely necessary to the maintenance of this action; for the reason that the complaint, as framed, embraces the cause of action for continuing the obstructions after the commencement of the first suit. (*See Colvin v. Burnet, 2 Hill, 620.*)

It is well settled that every continuance of a nuisance is a fresh one. (*3 Black. Com. 220. Brady v. Weeks, 3 Barb. S. C. R. 157. Vedder v. Vedder, 1 Denio, 257. Staple v. Spring, 10 Mass. Rep. 74. Fish v. Dodge, 4 Denio, 317. Brown v. The Cayuga and Susq. R. R. Co., 2 Kernan, 492.*) And I think the continuance of the obstructions in the channel of the creek, by the defendants, after the commencement of the first suit, should be deemed fresh ones; and that such continuance of those obstructions entitled the plaintiff to bring this action. In this view of the case the first suit was not a bar to this action, as it was limited at the trial.

The obstructions, of which the plaintiff complained in each action, were upon the defendants' land, where they could have removed them; hence the plaintiff was not entitled to recover, in the first suit, any damages occasioned by the obstructions after he commenced it. (*1 Denio, 257. Blunt v. McCormick, 3 id. 283.*)

I will not say, if the plaintiff had claimed exemplary damages in this action, as it seems he might, (*see 3 Black. Com. 220,*) but that it would have been necessary for him to set out in his complaint the first recovery, and allege a wrongful continuance of the obstructions, to have enabled him to recover such damages. But it is unnecessary to pass upon that question; because he has recovered only actual damages.

The case of *Wilbur v. Brown*, (*3 Denio, 356,*) is unlike this. If the recovery in that case had been permitted to stand on the declaration as it was framed, it would have conferred greater rights upon the plaintiff than he had. In other words, it would have estopped the defendant from setting up rights in a future litigation, which he confessedly possessed.

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In this case the form of the complaint has not prejudiced the defendants in the least. They have had all the benefit of the former suit to which they were entitled; and the form of the complaint in this action cannot possibly ever harm them in any future litigation, where the recovery herein shall be brought in question.

But if it be conceded that the complaint, as drawn, was defective, I am of the opinion it was the duty of the judge at the trial to direct that it be amended. Its amendment, if necessary to the maintenance of the action, was clearly "in furtherance of justice," and therefore proper. (*See Code*, §§ 173, 176; *Dauchy v. Tyler*, 15 *How.* 399; *Wood v. Wood*, 26 *Barb.* 359; 4 *Kernan*, 251; *Id.* 506; 2 *Smith*, 250; 3 *id.* 224.)

The judgment in this action should be affirmed, with costs.

Decision accordingly.

[CHENANGO GENERAL TERM, May 10, 1859. *Mason, Balcom and Campbell*, Justices.]

 CLARK vs. STORY.

The code, in prohibiting the bringing of an action in the same county, upon a justice's judgment, within five years after its rendition, does not prevent the use of such a judgment as a defense, set-off, or counter-claim; especially by an *assignee* thereof.

THIS action was tried by a jury in a justice's court, where a verdict was found in favor of the defendant; upon which the justice rendered judgment against the plaintiff for \$1.36 costs. The Otsego county court affirmed the judgment, and the plaintiff appealed from the judgment of that court to this court.

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James E. Dewey, for the plaintiff.

Dewitt C. Bates, for the defendant.

By the Court, BALCOM, J. This action was brought upon an account, which the plaintiff purchased of one Myers. But in the view I have taken of the case, it is unnecessary to determine whether the account was proved so as to authorize the jury to find a verdict thereon in favor of the plaintiff.

The defendant purchased a judgment of one Basler, that he had recovered against Myers before a justice of the peace; and he introduced it in evidence on the trial of this action, as a defense, or set-off or counter-claim. The plaintiff objected to its introduction, and insisted that it was inadmissible, for several reasons. But it was properly admitted, unless the fact that five years had not elapsed, after its rendition, at the time of the trial, prevented the defendant from thus using it. It is provided by section 71 of the code, that no *action* shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, *between the same parties*, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace shall be brought in the same county within five years after its rendition, except upon the happening of one of several events specified therein, not shown in this case to have transpired. I am of opinion the judgment against Myers was properly admitted in evidence, for two reasons: first, the code only prohibits *actions* on justice's judgments within five years after their rendition, and does not prevent parties thereto from using them as defenses, or off-sets or counter-claims *in actions*; secondly, if using the judgment, as the defendant used it on the trial, was equivalent to bringing an action upon it, still such use of it was not prohibited by the code, because the defendant was not a *party* to it, but only the assignee thereof. (*Tufts v. Braisted*, 4 Duer, 607. 12 How. Pr. R. 537.)

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The judgment was larger than the account, and was rightfully used to extinguish it. The jury, therefore, did right in finding a verdict for the defendant. The judgment of the county court should be affirmed, with costs.

Decision accordingly.

[CHENANGO GENERAL TERM, May 10, 1859. *Mason, Balcom and Campbell, Justices.*]

 HOWARD vs. HATCH.

Where a notice of sale, on a statute foreclosure, was first published on the 30th day of April, and lastly on the 16th day of July, being published twelve times in twelve successive weeks, once in each week, the day named in it for the sale being the 24th of July; *Held* that the notice was published for twelve weeks successively, within the meaning of the statute prescribing the time and manner of publication.

A publication is sufficient, if it be made once in each week for twelve weeks successively, although all the publications are made within 78 days; provided the first is 84 days prior to the day of sale specified in the notice, exclusive of the day on which it is made.

The affidavits of the publication and affixing of the notice of sale, &c., need not be *recorded*, in order to pass the title to the purchaser at a sale of mortgaged premises under a statute foreclosure.

Where a mortgage was assigned to T. as "Treasurer of Madison University, and to his successors in office;" and he took the same, and held it, and foreclosed it by advertisement, under the statute, in his official character, for the corporation; stating in his notice of sale that he, "as such treasurer," was the owner and holder of the mortgage; *Held* that, in the absence of all proof on the subject, the court would presume that T., as treasurer of the corporation, had authority to foreclose the mortgage by advertisement, and to sell the premises. And that, having such authority, his purchase of the premises at the sale, for himself, for a less sum than was due on the mortgage, did not render the sale void, or prevent him from conveying a good title to a purchaser. MASON, J., dissented.

THIS action was brought to recover the possession of ninety-five and three-fourths acres of land, situated in the town

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of Madison, in the county of Madison. The land was owned in 1853 by Uriah H. Ward, who executed a mortgage on it to John E. Burton, to secure the payment of \$1255.80, and interest thereon, at certain times therein specified. On the 22d of July, 1854, Burton executed, under his hand and seal, and delivered an assignment of the mortgage to Henry Tower; which assignment was as follows: "Know all men by these presents, that I, John E. Burton, the mortgagee within named, in consideration of \$1288.92, to me paid by Henry Tower, treas., &c., the receipt whereof is hereby acknowledged, have sold, assigned, transferred and set over to Henry Tower, treasurer of Madison University, and to his successors in office forever, the within mortgage, together with the bond accompanying the same, and all moneys due or to become due thereon; hereby covenanting to and with the said Tower and his successors that the sum of \$1288.92 remains unpaid thereon."

The mortgage was foreclosed, pursuant to title 15 of chapter 8 of the third part of the revised statutes, and the amendments thereto, entitled, "Of the foreclosure of mortgages by advertisement." The notice of sale was dated April 28th, 1856. The time specified in it for the sale was July 24th 1856. The notice contained this clause, viz: "Said mortgage was, on the 22d day of July, 1854, duly assigned to Henry Tower, treasurer of the Madison University, who, as such treasurer, is now the owner and holder thereof." And the notice was signed "Henry Tower, Treasurer of Madison University."

The land was purchased by Henry Tower, on the day named in the above mentioned notice, for the sum of \$1050, that being the highest price bidden therefor. The affidavit of sale did not show that Tower purchased the land as treasurer, or that he bought the same on his own account. The affidavit of publication of the notice of sale was in these words and figures, viz: "State of New York, county of Madison, ss.: Thomas L. James, of Hamilton, county and

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state aforesaid, deposes and says, that he is publisher and proprietor of Madison County Journal, a weekly paper, published in Hamilton, and that the annexed notice of mortgage sale (being the one above mentioned) has been published in said paper 12 weeks successively, once in each week, commencing April 30, and ending July 16, 1856."

Henry Tower and his wife conveyed the land to the plaintiff by a quit-claim deed, bearing date the 31st day of July, 1856. There was a statement in the deed that it was intended to convey only such interest as said Tower acquired in the premises, under and through said mortgage sale. The plaintiff's title to the land was derived under said mortgage sale, and by virtue of the above mentioned quit-claim deed from Tower. The defendant was in possession of the land at the time the same was purchased by Tower, by virtue of conveyances, subject to said mortgage, made by the mortgagor subsequent to the execution of said mortgage.

The action was tried before a referee. The main questions raised on the trial were, *first*, whether the notice of the sale of the land, by virtue of the power of sale contained in the mortgage, was published twelve weeks successively, at least once in each week, within the meaning of the statute on the subject; *secondly*, whether Tower could foreclose the mortgage and sell the land, so as to pass the title thereto without being authorized to do so by the Madison University, which was shown to have been a duly incorporated literary institution, when he was the treasurer of the university; it having been shown that he was such treasurer.

No evidence was given to show that Tower purchased, held or foreclosed the mortgage as treasurer of the Madison University, except that contained in the assignment of the mortgage by Burton to him, and in the notice of the sale; and there was no direct proof made, whether or not the Madison University authorized Tower to foreclose the mortgage. The affidavits of the publication of the notice of sale, of affixing the same on the outward door of the court-house, of serving

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the same on the defendant and others, and of the circumstances of the sale to Tower, were not recorded.

The defendant's counsel asked the referee to nonsuit the plaintiff on the grounds, among others, that the mortgage foreclosure was void; that the mortgage was owned by the Madison University, and the plaintiff had failed to show that such corporation ever authorized its foreclosure; that Tower had no authority to foreclose the mortgage, and could not legally foreclose it without authority for that purpose from the Madison University; that the notice of sale in the foreclosure proceedings was not published twelve weeks; that Tower had no title to the land in dispute when he executed the quit-claim deed thereof to the plaintiff; that the affidavits of the circumstances of the sale, &c., had not been recorded, and hence no title had been conveyed to the plaintiff by the quit-claim deed he took from Tower and wife. The referee refused to nonsuit the plaintiff, and the defendant, by his counsel, excepted. The referee held and decided that the plaintiff obtained title to the land in fee, under the mortgage sale, and by the deed from Tower and wife to him; and that he was entitled to recover. The defendant, by his counsel, excepted to the decision.

Judgment having been entered on the referee's report, in favor of the plaintiff, the defendant appealed therefrom to the general term of this court, where the defendant's counsel raised and discussed only the three questions examined in the following opinion of the court.

A. N. Sheldon, for the plaintiff.

D. J. Mitchell, for the defendant.

BALCOM, J. The plaintiff was not entitled to recover unless he proved and established, at the trial, that he had, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or

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to recover the possession thereof. (2 R. S. 303, § 3.) It was therefore necessary for him to show that all the requirements of the statute authorizing the sale of the premises by virtue of the power contained in the mortgage, had been complied with, to entitle him to the report made by the referee. (*Van-slyke v. Sheldon*, 9 Barb. 278. *Stanton v. Kline*, 16 id. 9.) Did he do this?

The notice of sale was first published on the 30th day of April, and lastly on the 16th day of July, 1856. The day named in it for the sale was the 24th of July in the same year. It was published twelve times, in 12 successive weeks, and only once in each week; and the time of sale was the 85th day after the first publication: so that the notice was published *during* eighty-four days, exclusive of the one on which it was first published and the day of sale; and I think it was published for twelve weeks successively, within the meaning of the statute prescribing the time and manner of publication. (2 R. S. 545, § 3, sub. 1. *Laws of 1842*, p. 364, § 5.) It was published *during* the time between the 16th and 24th days of July, as much as it was during the time intervening publication days, prior to the 16th of July. The decision in *Bunce v. Reed*, (16 Barb. 347,) is not an authority against this position; for Justice Hand, in that case, used this language: "I do not say that an affidavit of publication for twelve weeks successively, is not sufficient on a mortgage sale, if it distinctly appear that the first publication was at least eighty-four days (the day of first publication exclusive) before the sale." And I think the anonymous case in 1 *Wendell*, page 90, is not in conflict with the conclusion that a publication is sufficient, on foreclosing a mortgage by advertisement, if it be made once in each week for twelve weeks successively, although all the publications are made within seventy-eight days, as in this case, when the first is eighty-four days prior to the time specified in the notice for the sale, exclusive of the first day on which it is published.

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And I am of opinion the notice of sale in this case was regularly and sufficiently published.

The affidavits of publication and affixing the notice of sale, and of the circumstances of such sale, are made evidence by statute, of the sale and of the foreclosure of the equity of redemption, "without any conveyance being executed, in the same manner and with the like effect as a conveyance executed by a mortgagee upon such sale to a third person." (2 R. S. 547, § 14. *Laws of 1838, pp. 263, 264, § 8.*) It seems, however, that there must now be affidavits of the service of the notice of sale on the mortgagor, county clerk and others, mentioned in the statutes of 1844 and 1857, (*Laws of 1844, p. 529 ; Laws of 1857, vol. 1, p. 667,*) to make the evidence of the sale and foreclosure complete. (*Layman v. Whiting, 20 Barb. 559.*) But that question is not now before the court ; for all the above mentioned affidavits were made in this case.

The only proposition to be determined, on this branch of the case, is whether it was necessary to have the affidavit recorded, to pass the title of the premises in dispute to Tower, under the mortgage sale. Section 12 of the statutes "Of the foreclosure of mortgages by advertisement," declares that "such affidavits shall be recorded at length" by the county clerk, (2 R. S. 547 ;) but it does not say they must be so recorded before they "shall be presumptive evidence of the facts therein contained." And there is nothing in section 14, (by which it is declared that such affidavits "shall be evidence of the sale and of the foreclosure of the equity of redemption,") or in any other statute, making it obligatory on the person making the foreclosure and sale, to have the affidavits recorded, in order to pass the title of the lands to the purchaser. I think what is said in section twelve, about the affidavits being recorded, is merely directory ; and that the purchaser does not forfeit, or even suspend, his right to the premises purchased, by omitting to have the affidavits record-

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ed ; and that the words "shall be recorded," in such section, should be read as though they were "*may* be recorded."

The only necessity for a provision in section 12, on the subject of evidence, arose because "certified copies" of the record of the affidavits were therein declared to be presumptive evidence of the facts contained in the originals. This is palpable, for the reason that the original affidavits are made evidence of the sale and foreclosure by section 14 ; and all that is said in section 12 as to the original affidavits being presumptive evidence, if considered irrespective of the fact that certified copies of such affidavits are declared to be evidence, might have been omitted by the legislature, without varying the effect of sections 12 and 14 in the least, when construed together, as they must be ; for the reason that otherwise the two sections, as they stand, would exhibit useless legislative tautology.

The conclusion seems to me to be irresistible, that the affidavits pass the title to the purchaser without being recorded ; and that Tower acquired the title to the premises in dispute, although the affidavits, which show how he obtained it, were not recorded. In coming to this conclusion, I have not been unmindful of the dictum of the learned Judge Cady, in the *Cohoes Company v. Goss*, (13 Barb. 144,) that no title passes to the purchaser until the affidavits be recorded. This remark was wholly unnecessary to the decision of the case in which it was made ; and it purports to have been induced by the opinion of Chief Justice Bronson, in *Arnot v. McClure*, (4 Denio, 41.) But with all due deference to the great learning and usual accuracy of Justice Cady, I think the opinion, in that case, instead of supporting his dictum, militates against it ; for Judge Bronson there said : "Now, by express enactment, the affidavits may have all the force and effect of a conveyance by the mortgagee to a third person. (2 R. S. 547, § 12. Stat. of 1838, p. 263, § 8.) This is *in addition* to the provision that the affidavits, *when recorded*, shall be

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presumptive evidence of the facts therein contained ; and they now perform the double office of proving the regularity of the proceedings to foreclose, and standing as a conveyance to the purchaser." (4 *Denio* 44, 45.) I therefore hesitate much less, in saying that the dictum of Justice Cady is erroneous, than I should if I supposed it was sustained by even an *obiter* remark of Justice Bronson.

The only remaining question to be determined, in this case, is whether the plaintiff should have recovered, without expressly proving that Tower was authorized by the Madison University to foreclose the mortgage, under which he claimed title to the premises in dispute. That institution was duly incorporated by a legislative act in 1846. (*Laws of 1846*, p. 32.) Tower was the treasurer of the corporation ; and the evidence showed that he took the mortgage and held it, and foreclosed it in his official character, for the corporation. It was assigned to him as treasurer, and "to his successors in office ;" and he stated, in the notice of sale of the mortgaged premises, that he, "as such treasurer," was "the owner and holder" of the mortgage. We should presume that Tower had authority from the corporation to receive all moneys due on the mortgage, and to cancel or satisfy it as treasurer. The case of *Jackson v. Campbell*, (5 *Wend.* 575,) shows that in the absence of all proof on the subject, we should presume that Tower, as treasurer of the Madison University, had authority to foreclose the mortgage by advertisement, and sell the premises ; and having such authority, his purchase of the premises at the sale, for himself, for a less sum than was due on the mortgage, did not render the sale void, or prevent him conveying a good title to the plaintiff.

The judgment in the action should be affirmed with costs.

CAMPBELL, J., concurred.

MASON, J., dissented, on the ground that it was not shown

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that Tower was authorized by the Madison University to foreclose the mortgage.

Judgment affirmed with costs.

[CHENANGO GENERAL TERM, May 10, 1859. *Mason, Balcom and Campbell, Justices.*]

WHITE, Receiver of the Union Insurance Company, *vs.*
COVENTRY and BENSON.

A provision in the charter of a mutual insurance company organized under the act of April 10, 1849, relative to "the incorporation of insurance companies," that the corporation may divide applications for insurance into two or more classes, according to the degree of hazard, and that the premium notes shall not in such case be assessed for any losses, except in the class to which they shall belong, is valid, and not in conflict with any part of the act under which the company is formed.

And a company thus formed having divided its business and risks, pursuant to its charter, into two distinct classes or departments, viz. a *farmers'* department, and a *commercial* department, and taken notes for risks in the latter department, which notes were afterwards assessed by the receiver of the corporation, to pay losses in that department; *Held* that an action would lie, by the receiver, to collect an assessment so made.

Parties who have contracted with a corporation, as such, cannot afterwards raise the objection that the company was not legally incorporated.

If there are any defects in the organization of a company, they will be cured by a subsequent act of the legislature which treats it as an existing corporation, and changes its name.

THIS action was tried by consent, at a special term of this court, in Chenango county, in August, 1857, before Mr. Justice MASON, without a jury. It was upon a note in the form following: "\$150. For value received in policy No. 2094, dated the 4th day of September, 1851, issued by the Union Mutual Insurance Company, I promise to pay the company, or their treasurer for the time being, the sum of one hundred and fifty dollars, in such portions and at such

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time or times as the directors of the company may require, agreeably to their act of incorporation.

(Signed,)

COVENTRY & BENSON."

The complaint stated that the insurance company named in the note was incorporated as a mutual insurance company, pursuant to the general act providing for the incorporation of insurance companies, passed April 10, 1849. (*Laws of 1849, p. 441.*) That it had been proceeded against in the supreme court as an insolvent corporation, and that the plaintiff was, on the 6th June, 1853, appointed receiver of its property and effects; and that subsequently it had been adjudged to be insolvent, and its property had been sequestrated for the payment of its debts. The complaint then set forth the note above mentioned, and averred that an assessment had been made thereon by the plaintiff, as receiver, to pay costs and expenses which had accrued whilst the policy accompanying said note was in force. The plaintiff claimed to recover said assessment, which was the whole balance due on said note. The answer set forth, among other things, that the company was fraudulently organized, and had not power to issue policies of insurance, and had not a capital of one hundred thousand dollars. That said company had no legal existence, and that the defendants' note was without consideration.

On the trial, the declaration of intention to form a company, commission and certificates of the comptroller, and the certificate of the attorney general with the charter annexed, were proved, and also the order of the court appointing the plaintiff receiver, and the judgment sequestrating the company and confirming the plaintiff's appointment as receiver, and directing an assessment by him of the notes of the company, whereby it appeared that the defendants' note was assessed to the entire balance due thereon; and that said assessment was confirmed by the supreme court, and the plaintiff ordered to make collection thereof. It also appeared that the notes were assessed to pay for losses by fire, and for liabilities which ac-

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crued whilst the policies accompanying said notes were in force.

The second section of the company's charter was as follows: "2d. Said company is formed to make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture, merchandise and other property, against loss or damage by fire, and the risk of inland navigation and transportation, as provided in the second subdivision of the first section of the aforesaid act. Its business shall be conducted on the plan of mutual insurance, and it shall possess all the powers conferred by said act, which now are or hereafter may be conferred by law upon an incorporated company formed under said act for the purpose aforesaid, whose business is to be conducted on the plan aforesaid."

The eighth section was as follows: "8. The rates of insurance shall be from time to time fixed and regulated by the company, and premium notes therefor shall be received from the insured, which shall be paid at such time or times, and in such sum or sums, as the corporation shall from time to time require; any person applying for insurance, so electing may pay a cash premium in addition to a premium note, or a definite sum in money, to be fixed by said corporation in full for said insurance, and in lieu of a premium note."

The tenth and eleventh sections were as follows: "10. The board of directors may, pursuant to the provisions of the said act, unite a cash capital to any extent, as an additional security to the members over and above their premium and stock notes, and prescribe the mode and manner in which such cash capital shall be subscribed and united as aforesaid.

11. The corporation may divide applications for insurance into two or more classes, according to the degree of hazard, and the premium notes shall not in such case be assessed for any losses, except in the class to which they belong."

The by-laws, as proved, contained the following, among other provisions: (*Art. 2, § 1.*) "The company shall divide their business and risks, pursuant to their charter, into two dis-

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distinct classes or departments, viz. *first class, or farmers' department*. This class is designed for and confined strictly to insuring, against fire, farm property and detached buildings. *Second class, or commercial department*. This class is designed for insuring stores, shops, merchandise and all kinds of property in villages and cities, excepting what may be specially hazardous, which will not be taken by the company. To this class may be added risks on inland navigation and transportation. The accounts of each class shall be kept distinct, and the premium notes in either shall not be assessed for any loss except in the class to which they may belong. The company will insure for five years or less in the first class; but in the second class, for a time not to exceed two years, viz. one year or less upon stock rates, and for two years and not less than one, mutually or for cash only; but not more than two thirds of the estimated value of any building, above the cellar wall, shall be insured therein. "§ 17. The directors may make such assessment on the premium notes as may be necessary to pay losses and expenses of assessment, and in making the same the maker shall be assessed only in proportion to the time his note bears date."

The defendants' note was in the "commercial department," and the notes of that department were assessed to the entire balance due thereon; but the notes in the "farmers' department" were assessed to less than the balance due thereon. The plaintiff recovered a judgment against the defendants for \$90.45, being the amount of said assessment, with interest thereon from the time the same was payable, besides costs. The defendants appealed therefrom to a general term of this court.

Upon the argument at general term, the defendants' counsel claimed that the two separate organizations were entirely unauthorized by the general act, and that the object of the statute was to have but one organization; to subject the whole capital *in solido* to all the risks assumed, and to make each person insured an insurer of all the rest to the amount of his

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own note; and that this assessment which was sought to be enforced, not being an assessment upon the whole capital, but only upon a part, was illegal and void. The defendant also claimed that the company was not legally incorporated.

Henry R. Mygatt, for the plaintiff.

James R. Cox, for the defendants.

By the Court, BALCOM, J. The decision made by this court, at the Cortland general term in November, 1858, in *White, receiver, v. Selover and Haskill*, virtually determines this case in favor of the plaintiff.

The Union Mutual Insurance Company was organized under the act "to provide for the incorporation of insurance companies," passed April 10, 1849. (*Laws of 1849, p. 441.*) The 10th section made it the duty of the corporators to declare, in their charter, "the mode and manner" in which they were to exercise their corporate powers. And they declared, in the 11th section of their charter, that the corporation might divide applications for insurance into two or more classes, according to the degree of hazard; and that the premium notes should not in such case be assessed for any losses, except in the class to which they should belong. And I am of the opinion this provision of the charter does not conflict with any provision in the act under which it was formed. (*See opinion of Paige, J., MS., in Sheldon, receiver, v. Roseboom.*) (a)

(a) PAIGE, J. The act to provide for the incorporation of insurance companies, passed April 10th, 1849, section 3, directs the associates to file a declaration, &c., comprising a copy of their charter, and section 10 directs that the corporation declare, in their charter, the mode and manner in which their corporate powers, &c. are to be exercised. The 11th section directs that the charter be examined by the attorney general, and, if found by him to be in conformity with the act, that he certify the same to the comptroller, &c. And the same section provides that, on filing in the office of the clerk of the county, &c., certified copies of such certificate, and of the certificate of the

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This court has repeatedly held, in this district, that the Union Mutual Insurance Company should be deemed to have been duly incorporated, in actions between the receiver of it

comptroller or examiner therein mentioned, &c., the company shall be authorized to commence business and issue policies. Section 12 authorizes the directors to make such by-laws as are not inconsistent with the constitution and laws of the state, as may be deemed necessary for the government of their officers and the conducting of the affairs of the company. The charter (§ 13) of the company in this case declares that the company may divide applications for insurance into two or more classes, and that the premium notes received upon such applications should not, in such case, be assessed for the payment of any losses, except in the class to which they belonged. The company, in its by-laws, divided their risks into two classes or departments, &c.

I am inclined to believe that the provisions of the general insurance act above cited, authorized the Columbian Insurance Company to divide its risks or applications for insurance into two classes. This division, in my judgment, does not infringe the provisions of the act in relation to the amount of capital, or impair the security provided by the act against the evil of an insufficient fund, or of unreasonable contributions by the assured. This division of the risks into two classes cannot be regarded as a division of the company (as stated by Mr. Justice MARVIN) into two organizations. If the capital to be applied in the payment of losses is divided, so are the risks. If the capital, in consequence of the division, is less for each department, the risks are also proportionately less. It is therefore clear that the assured cannot be injured by the division of the risks.

The 10th section of the act, which directs the company to declare, in its charter, the mode and manner in which its corporate powers are to be exercised, authorizes the company, at its election, to provide in its charter for a division of the risks, and the assessment of the premium notes for losses only which arise in the class to which they belong. Such a provision in the charter, clearly relates to the mode and manner in which the corporate powers of the company are to be exercised. The 11th section of the act, in substance, declares that the filing of the certificate of the attorney general, that the charter is in conformity to the act, together with the certificate of the comptroller, &c., as to the capital, shall authorize the company to commence business and issue policies. Such certificate of the attorney general would seem to be conclusive as to the legal right of the Columbian Insurance Company to divide its risks into two classes; for the act declares that the filing of such certificate, &c., shall be the authority of the company to commence business, &c., that is, to commence business in the mode and manner declared in its charter, which is, in the first place, by the division of the risks into two classes.

For the above reasons, I think that the decision in *Thomas v. Achilles*, (16 Barb. 491,) is erroneous.

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and those who have contracted with it as a corporation. But if there were any errors committed in its formation, they were cured by the law of 1851, which changed its name to "The Union Insurance Company." (*Laws of 1851, p. 775.*) The legislature had power to confirm its organization if it was irregularly formed. (*The People v. The Manhattan Co., 9 Wend. 351. See 1 Kernan, 102; 4 id. 336.*)

The defendants were insured by the corporation, after its name was changed, and have not even the shadow of a right to object to the validity of its charter. They are as much estopped from setting up the invalidity of the charter, as the corporation would have been, if it had been sued by the defendants upon the policy they took of it, for a loss, by fire, of the insured property. (*See 3 Sandf. 170; 17 Barb. 378; 17 Ohio Rep. 407.*)

The charter being valid, as between the plaintiff and the defendants, and the note of the latter having been assessed pursuant to its provisions, they were liable to pay the assessment made on it.

These views dispose of the only points relied upon by the defendants' counsel. The judgment in the action should therefore be affirmed with costs.

Decision accordingly.

[CHENANGO GENERAL TERM, May 10, 1859. *Mason, Balcom and Campbell, Justices.*]

WHITAKER vs. THE FARMERS' UNION INSURANCE COMPANY.

The plaintiff, on the 28th of March, applied to the agent of the defendant for insurance, who gave him a receipt acknowledging the payment of the premium, and stating that the policy was to take effect on that day at noon. The premium was not actually paid, at the time, it being agreed that the plaintiff might send it to the agent at his convenience. The property insured was destroyed by fire on the 7th of April. The premium was sent to the agent immediately after the fire, and he accepted the money, without having heard of the loss, and sent the application, together with the premium, to the defendant. The defendant thereupon, without any knowledge of the fire, forwarded a policy for the plaintiff to the agent, but subsequently, on being informed of the loss, instructed him not to deliver the same.

Held that when the defendant accepted the premium, and forwarded the policy to its agent for delivery, the agreement to insure was complete and ratified, as of the 28th of March; and the plaintiff was entitled to a specific performance thereof by the delivery of the policy to him and the payment of the amount of the loss.

MOTION by the defendant for a new trial. The plaintiff resided at Hale's Eddy, N. Y., on the New York and Erie rail road, and the defendants' chief place of business was at Athens, Pa.; the defendants' agent resided at Hancock, N. Y., and having called at the plaintiff's house on the 28th of March, 1857, and proposed to insure it in the defendants' company, a written application was made and signed by the plaintiff, and a receipt given, acknowledging the payment of the premium. The premium was not actually paid at the time, but it was agreed that the plaintiff might send it to the agent at his convenience. The plaintiff was told that his contract of insurance was complete from the date of the receipt, and that his policy would soon be ready, &c. The receipt was dated on the said 28th March, 1857; the house was burned on the 7th of April thereafter, and the furniture wholly or partially destroyed. The premium was sent to the agent immediately after the fire, and he accepted the money, not knowing of the fire. The company made out and sent a policy to the agent, but having heard of the destruction of the house, directed the agent not to deliver it to the plaintiff,

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but to refund the premium. The agent declined to deliver the policy, and tendered the premium to the plaintiff, which the plaintiff declined to receive, and brought his action for a specific performance of the contract of insurance. The cause was tried at the Broome special term, in April, 1858, before Justice CAMPBELL, who found the above facts; also that the plaintiff had no knowledge of the specific powers given to the agent by the defendant; that there was no fraud or concealment on the part of the plaintiff; and that he was entitled to a policy on his house and furniture, to take effect from the said 28th of March, at noon. And the judge found, as matter of law, that the plaintiff was entitled to a specific performance of the agreement to insure his property, as claimed in the complaint, and to recover the damages sustained by him, with costs.

D. S. Dickinson, for the plaintiff.

John J. Taylor, for the defendant.

By the Court, BALCOM, J. The plaintiff's application for insurance was dated the 28th day of March, 1857, and the agreement to insure was made on that day; but the \$36.50 premium, agreed to be paid for the policy, was not then paid, although the receipt taken by the plaintiff of the defendants' agent states that it was then paid. The receipt states that the policy was to take effect on the day above mentioned, at noon. The property that the defendant agreed to insure was a house and the furniture in it. The same burned in the night of the 7th of April, 1857. The plaintiff by his agent, Hotchkiss, paid to the defendants' agent the premium for the insurance on the 8th of April, 1857, without disclosing the fact that the house and furniture had been burned; and the defendants' agent, in ignorance of that fact, then sent the plaintiff's application for insurance, and the \$36.50 premium to the defendant; and the defendant immediately forwarded a policy in due form, in accordance with the application, to

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its agent, for the plaintiff. The policy insured the house and furniture from noon of the 28th day of March, 1857. The defendants' agent learned of the burning of the house and furniture before he received the policy, and refused to deliver it to the plaintiff. He returned it to the defendant, and tendered back the premium to the plaintiff, who refused to take it.

I have no doubt but that the policy would have been delivered to the plaintiff, and been regarded by the defendant as binding from noon of March 28th, 1857, if the house and furniture had not been burned in the night of the 7th of April. And had it been delivered, it would have been valid from the time it was made to take effect. (*Hallock v. The Commercial Ins. Co.*, 2 *Dutcher's N. J. Rep.* 268. ' 4 *Cowen*, 645.) The defendants should not be permitted to say the policy would have been good from the 28th of March, 1857, if no fire had occurred, but is void because there was a fire on the 7th of April of that year, and be allowed to repudiate its agreement to insure. When the defendant accepted the premium, and forwarded the policy to its agent, the agreement to insure was complete and ratified as of the 28th of March, 1857; and the policy became the property of the plaintiff. (2 *Dutcher*, 278, 279, and cases there cited.)

The judge before whom the action was tried has found that there was no fraud or concealment on the part of the plaintiff; and I think the plaintiff was under no legal or moral obligation to inform the defendant or its agent of the fire, before or at the time the premium was paid; for the agent had received the application for the insurance and given the plaintiff credit for the premium, according to the finding of the judge upon the evidence. (2 *Dutcher*, 274.) The plaintiff was entitled to have his application for insurance acted upon by the defendant, after the fire, in precisely the same manner that it would have been if no fire had occurred.

One of the conditions of the policy issued by the defendant for the plaintiff was, that no insurance should be considered

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as binding until the *actual payment of the premium*; and for this reason the defendants' counsel insists that the agreement to insure, made by the agent of the defendant, was invalid. Now granting that the defendant may have refused to fulfill the agreement on that ground, (as to which I will express no opinion,) it did not do so, but ratified it by accepting the premium and issuing the policy, which insured the house and furniture from the time the agreement was made. And, as has already been seen, the plaintiff was not bound to inform the defendant or its agent that his house and furniture had been burned; and that an agreement to insure from a time past is valid. It follows that the defendant was properly adjudged liable to specifically perform the agreement to insure by delivering the policy to the plaintiff, and to pay the damages the plaintiff sustained by reason of the fire.

The defendants' motion for a new trial should therefore be denied, with costs.

CAMPBELL, J., concurred in the above opinion.

MASON, J., expressed no opinion in the case.

New trial denied.

[CHENANGO GENERAL TERM, May 10, 1859. *Mason, Balcom and Campbell*, Justices.]

FANCHER & FOOT vs. GOODMAN.

On the 19th of June, 1857, the plaintiffs bought of the defendants a quantity of sheep, for the sum of \$168, paying \$50 of the price down, and agreeing to pay \$50 on the 22d of that month, and to take the sheep away and pay the balance of the purchase money, within ten days from the day of sale. The plaintiffs did not pay the \$50 on the 22d of June, and did not call for the sheep, and offer to pay the balance of the price, within ten days. On the 7th of July the defendant told the plaintiffs that the sheep were sold to another person, and refused to let the plaintiffs

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have them. In an action to recover back the \$50 paid by the plaintiffs at the time of the sale, and damages, *Held* that if the defendant meant to enforce the contract, he should have given the plaintiffs notice that if they did not take the sheep, and pay the balance of the purchase money by a specified time, he should sell the sheep, and look to the plaintiffs for any deficiency. That having resold the sheep, without giving such notice, the defendant *rescinded* the contract *in toto*, and lost all right of action against the plaintiffs for their breach of it, and became liable to refund to them the \$50 paid on it.

Held, therefore, that the plaintiffs were entitled to recover the \$50 paid by them, with interest thereon from the time the defendant rescinded the contract; but that, being themselves in the wrong, they could not recover any damages of the defendant for his rescission of the contract.

Held also, that it was not necessary for the plaintiffs to demand the \$50 of the defendants, before bringing their action to recover it back.

THIS was an appeal by the plaintiffs from a judgment entered upon the report of a referee. The plaintiffs were partners in buying and selling sheep, and on the 19th day of June, 1857, bought of the defendant 48 old sheep at \$3.50 per head, and 12 lambs thrown in. The plaintiffs paid \$50 down, on the sale, and were to pay \$50 on the 22d of said month, and take the sheep away within ten days from the making of the sale, and pay the balance of the purchase money. The plaintiffs did not pay the \$50 on the 22d, and did not call for the sheep and offer to pay the purchase money within ten days. On the 7th of July the defendant told the plaintiff Foot that the sheep were sold, and refused to let the plaintiffs have them. The plaintiffs brought this action to recover the \$50 paid on the sale, and damages. The referee decided that the plaintiffs were not entitled to recover, and the plaintiffs excepted to this decision. Judgment was entered against them for costs.

Loomis & Rogers, for the appellants.

Henry A. Clark, for the respondent.

BALCOM, J. "Earnest," says Kent, (2 *Kent's Com.* 4th ed. 494 and 495,) "is one mode of binding the bargain, and giving

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to the buyer a right to the goods upon payment; and if he does not come in a reasonable time *after request*, and pay for and take the goods, the contract is *dissolved*, and the vendor is at liberty to sell the goods to another." It was held in *Niel v. Cheves*, (1 *Bailey's S. C. Rep.* 537,) that if time and place for delivery be appointed, and the purchaser does not attend, or offer to pay, the vendor may *rescind* the contract, even though he had previously received part of the purchase money.

The referee has found, in this case, that the plaintiffs did not offer to pay the balance due for the sheep within the time allowed by the contract, and that they did not demand the \$50 of the defendant which they had paid him towards the sheep; also, that the defendant did not sell the sheep until the time had expired within which the plaintiffs were to take them and pay the balance they had agreed to pay therefor.

If the defendant had desired to keep the contract good, he should have given the plaintiffs notice that he should sell the sheep, if they did not take them and pay what remained due for them by a certain time, and look to the plaintiffs for any deficiency in the price they agreed to pay him therefor, which they should bring, by way of damages, for the plaintiffs' breach of the contract. (1 *Sandf. S. C. Rep.* 297.) When the defendant sold the sheep, without giving such notice to the plaintiffs, he *rescinded* the contract *in toto*, and lost all right of action against the plaintiffs for their breach of it, and became liable to refund to them the \$50 he had received on it. This principle was settled in this state in *Raymond v. Bearnard*, (12 *John.* 274,) in the year 1815, and it has not since been departed from. That case also determines the question that it was unnecessary for the plaintiffs to demand the \$50 of the defendant, before bringing their action to recover it back. (*Also see* 5 *Hill*, 107; 14 *N. Y. R.* 492.) It is therefore clear that the plaintiffs were entitled to recover the \$50 they paid towards the sheep, with interest thereon from the time the defendant rescinded the contract; but they

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were not entitled to recover any damages of the defendant for his rescission of the contract, because they did not fulfill it themselves, by reason of their omission to call on the defendant for the sheep and offer to pay him what was due therefor, within the time fixed by the contract. The judgment in the action should be reversed, and a new trial granted; costs to abide the event.

MASON, J. concurred in the above opinion.

CAMPBELL, J. As far back as the case of *De Fonclear v. Shottenkirk*, (3 John. 170,) Mr. Justice Spencer thus clearly defines a contract of the character of the one in this case: "Independently of the statute, any words importing a bargain, whereby the owner of a chattel signifies his willingness and consent to sell, and whereby another person shall signify his willingness and consent to buy *in presenti*, for a specified price, would be a sale and transfer of the right to the chattel."

In this case, fifty dollars, part of the purchase price, was paid at the time of making the bargain. The whole facts and circumstances show an absolute and unconditional sale. The title to the sheep vested in the vendees. The vendor retaining possession had a lien for the unpaid purchase money. There were no conditions attached to the sale. It was not stipulated that the vendees could have the sheep, provided they approved of it within a certain time and paid the balance of the purchase price. The sale was *in presenti*, the delivery to take place at a future day, on receipt of the balance of the purchase money. It is said that if a time and place be appointed for payment, and the buyer do not attend at such time and place, the seller may also resell, although earnest be given. (*Story on Cont.* § 788.) In this case it was not earnest money merely: it was part payment—the sum paid amounting to more than one fourth of the whole purchase price. Still the vendor, under his lien, might have proceeded and resold the property, on giving notice to the vendees, and at their risk and charge; or he might have sued for the un-

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paid purchase money, if the vendees had refused to accept the sheep and pay therefor. The vendor did neither. Without notice to the vendees, he undertook arbitrarily to rescind the contract, and without notice proceeded to sell the sheep to third parties, at a price which does not appear; and refused even to return the fifty dollars, part payment.

There must be a new trial; costs to abide the event.

Decision accordingly. Order of reference to stand; but either party to have liberty to apply for the appointment of a new referee.

[CHENANGO GENERAL TERM, May 10, 1859. *Mason, Balcom and Campbell, Justices.*]

BECKER and others vs. VAN VALKENBURGH and others.

Where a person's entry and claim of title are not founded upon any written instrument, or any judgment or decree, he will be deemed to have possessed and occupied only so much of the lands as have been protected by a substantial inclosure, or have been usually cultivated or improved.

Where there is no claim of title founded upon a written instrument, or a judgment or decree, there must be a *pedis possessio*—an actual occupancy, or a substantial inclosure of the lands, definite, notorious and certain, to constitute an adverse possession.

But the inclosure need not be by an artificial fence, or other erection. Thus, where there was a fence on the south and west sides of the premises, and on the east and southeast sides was a ledge of rocks from 200 to 400 feet in height, but no other barrier; *held* that such ledge of rocks completed the inclosure, as much so as if an artificial fence had been constructed along that line.

Under the revised statutes, as formerly, if an adverse possession commences in the lifetime of the ancestor, it will continue to run against the heir, notwithstanding any existing disability on the part of the latter, when the right accrues to him or her.

In an action for trespass in cutting timber, the plaintiffs showed a paper title in them to the land on which the timber was cut. The defense was adverse possession. It was proved that as early as the year 1823, the defendant V., under a license from his father, who claimed the premises, entered upon them, erected a house, and made a clearing thereon. A part of the land

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was then in the occupancy of B., the father of two of the plaintiffs. V.'s entry was under a claim of right, open and notorious, and in hostility to the grantors of the plaintiffs. He lived on the lot, claiming it as his own and cultivating a portion thereof, and cutting his firewood and timber therefrom. His possession and claim was continued during the lifetime of B., (who died in 1854,) and afterwards, until 1848 or 1849, the time of the alleged trespass. The plaintiffs never attempted to assert any claim to that portion of the premises on which the trespass was alleged to have occurred, until 1850 or 1851. *Held* that these facts tended to establish an *adverse possession* in V., and justified the finding of the referee in favor of the defendants.

APPEAL from a judgment entered on the report of a referee. The plaintiffs sued the defendants in trespass, for cutting and carrying off a quantity of timber from lot No. 14, in Butler and Clark's patent, in the town of Fulton, in the county of Schoharie. The defendants answered, 1st, denying the allegations of the complaint; and 2d, averring title to the close or premises on which the alleged trespass was committed, in the defendant Jacob Van Valkenburgh. It appeared, on the trial, that lot No. 14 was originally deeded by one William Zimmer to William H. Becker, the father of two of the plaintiffs. One Snyder claimed to have an interest therein originally, and occupied a part of the lot during his lifetime. After his death, Lawrence Sternburgh, his son-in-law, occupied a part of the lot. Lawrence Bouck, another son-in-law, bought out Sternbergh's interest, and remained there until his death in 1841. John L. Bouck, one of the plaintiffs, took his place, having succeeded by grant to the interest of Lawrence Bouck. William H. Becker occupied Zimmer's part from 1811 to 1834, when he died. The Strasburgh patent lay westerly of the Butler patent, and the line between lot No. 14 and the premises occupied by the father of Jacob Van Valkenburgh, one of the defendants, in the Strasburgh patent, ran through unimproved lands. As early as 1823, the father of Jacob Van Valkenburgh claimed to own the lands in dispute. In that year Jacob Van Valkenburgh built a house on the lands, between the lot occupied by his father and a ledge of rocks from 200 to 400 feet high, next to the Schoharie creek. He

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got the timber to build his house from a strip of land westerly of this ledge of rocks. The cutting complained of by the plaintiffs was done in and about the place where the timber was got to build the house, and, at the farthest, not over four rods from where the house stands. The defendant Jacob Van Valkenburgh moved on the lot after his house was built, cleared and improved some of it, continued to get firewood and timber from it, and resided upon it at the time of the trial. The land was inclosed on the upper and south side, and the ledge of rocks was on the east; the land east of the ledge, and between that and the Schoharie creek, was flat, and was cultivated by William H. Becker, up to his death, and subsequently by the plaintiffs.

It seems, by the case, that Caty Becker, the wife of William H. Becker, conveyed, by deed, to Joseph and Garret W. Becker, two of the plaintiffs, her interest in lot No. 14, Butler's patent; but at what time, did not appear. She was examined as a witness on the trial, and stated that after the death of her husband she gave her sons Joseph and Garret the land, to go on and to occupy it, the same as if it was their own.

In the fall of 1850, one Becker, a surveyor, surveyed a part of the west line of the Butler and Clark patent. He made two surveys of the northwest corner of the patent, and fixed what he deemed to be the true west line. This line ran through a part of the defendant's barn and clearing, and the course made by him ran out into land cultivated by a brother of Jacob Van Valkenburgh. It was west of that part of the lot upon which the evidence showed the defendants to have been cutting some fifty pine logs. This cutting, however, was south of the defendant's house. The referee found that the defendant John Van Valkenburgh was a son of Jacob, and acting under his direction; that the line run by Becker, the surveyor, was the true westerly line of Butler's patent, and therefore that the plaintiff was entitled to recover, unless the defendants had been successful in establishing their ad-

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verse possession ; that it appeared that the line run by Becker takes in a portion of the land of the defendant Jacob Van Valkenburgh, including his dwelling house, which it was conceded the plaintiffs could not recover ; and as to that portion of lot No. 14, Van Valkenburgh's adverse possession was complete.

The referee also decided that it was equally complete, from the evidence in the case, as to that portion on which the logs were cut ; that he was bound to regard the ledge of rocks as completing the inclosure, as much so as if the fence had been constructed along them ; that no man with such a boundary to his possession would regard any artificial fence as necessary ; that if the line run by Becker was the true line, the plaintiffs and their grantors had slept upon their rights, and could not now disturb a possession in which they had acquiesced too long. He accordingly reported in favor of the defendants.

L. Tremain, for the plaintiffs.

J. I. Werner, for the defendants.

By the Court, WRIGHT, J. There is but a single point in this case, viz. whether the evidence is sufficient to uphold the finding of the referee that the premises upon which the logs were cut were held adversely by one of the defendants at the time of the alleged trespass. The referee assumed that the plaintiffs had shown a proper title to lot No. 14, in what was known as the Butler or Clark patent, and that the line run by the surveyor, Becker, was the true western line of such patent. In his view, therefore, the defendants were trespassers, unless the proof established an adverse possession in Jacob Van Valkenburgh, of the lands from which the timber was taken.

The evidence, it seems to me, tended to establish an adverse possession, and justified the finding of the referee. As early as 1823, Jacob Van Valkenburgh, under a license from his father, who claimed the lands lying between lot No. 18 in the

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Strasburgh patent and a ledge of rocks easterly thereof, entered upon such lands, erected a house and made a clearing thereon. At this time that part of the Butler patent east of this ledge of rocks, and between the ledge and the Schoharie creek, was in the occupancy of William H. Becker, the father and ancestor of two of the plaintiffs. Van Valkenburgh's entry was under a claim of right, open and notorious, and in hostility to the grantors of the plaintiffs. He lived on the lot, claiming it as his own as far east as the ledge of rocks. He cleared and cultivated a portion of it, and cut his firewood and timber from the improved part adjoining and westerly of the ledge. He erected a fence on the upper and south side of the premises, and that part which was not improved was used as a wood lot and pasture. The possession and claim was continued during the lifetime of William H. Becker, whose death occurred in 1834, and afterwards down to the time of the alleged trespass in 1848 or 1849. Van Valkenburgh occupied the premises at the time of the trial in 1852, and it was not until after Becker's survey in 1850, or 1851, that the present plaintiffs seemed ever to have attempted to assert any claim to the land westerly of the ledge of rocks. The defendant's entry and claim of title seems not to have been founded upon any written instrument, or any judgment or decree, and hence he is to be deemed to have possessed and occupied adversely only so much of the lands as have been protected by a substantial inclosure, or have been usually cultivated or improved. Where there is no claim of title founded upon a written instrument, or a judgment or decree, there must be a *pedis possessio*—an actual occupancy, or a substantial inclosure of the lands, definite, notorious and certain, to constitute adverse possession. The line traced by Becker (if the true westerly line of the Butler patent) embraced within such patent a portion of the improved land and the dwelling house and barn of Jacob Van Valkenburgh. To so much of the disputed premises, it was not pretended that Van Valkenburgh's adverse possession was incomplete. But the logs were cut some four or five rods

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southeasterly of the dwelling house, and upon that part of the premises improved and lying adjoining to and west of the ledge of rocks. The question therefore occurred, whether that part of the premises where the trespass was claimed to have been committed was protected by a substantial inclosure. Van Valkenburgh had maintained a fence on the south and west sides of the premises ; and on the east and southeast was the ledge of rocks, from 200 to 400 feet in height. Along this ledge there was no artificial fence ; but in the view of the intelligent referee—and it is also our view—this ledge completed the inclosure, as much so as if a fence had been constructed along it. With such a boundary to his possession, no man would regard an artificial fence as necessary. Nature had substantially inclosed the possession on its eastern boundary. (*Jackson v. Halstead*, 5 Cowen, 216.)

It was claimed, on the argument, that the plaintiffs were reversioners, and as to them there could be no adverse possession. The referee, in his report, regards the Beckers as reversioners ; the mother having a life estate in the premises. But there is nothing in the case, as presented to us, to show that the whole estate was not in the plaintiffs. Indeed it appeared that the mother, after the death of her husband, had conveyed to her sons her interest in lot No. 14 ; so that if she had a life estate, at any time, in the disputed premises, she had parted with it to her sons Joseph and Grant. But allowing the fact to be that the Beckers were reversioners, still the point is not sustainable, for the reason that the defendants' adverse possession commenced in the lifetime of William H. Becker, the ancestor and grantor of the plaintiffs. William H. Becker became seised in 1810 ; Jacob Van Valkenburgh entered and built on the premises in 1823 ; Becker died in 1834, eleven years after the entry of the defendant Jacob Van Valkenburgh. The statute consequently commenced running against the plaintiffs' ancestor before the creation of Caty Becker's particular estate ; and under the revised statutes, as formerly, if an adverse possession commence in the

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lifetime of the ancestor it will continue to run against the heir, notwithstanding any existing disability on the part of the latter, when the right accrues to him or her. (*Fleming and wife v. Griswold*, 3 Hill, 85. *Jackson v. Schoonmaker*, 4 John. 401, 402.) The judgment rendered upon the report of the referee should be affirmed.

[ALBANY GENERAL TERM, December 6, 1858. *Harris, Wright and Gould*, Justices.]

CITY SAVINGS BANK *vs.* BIDWELL and others.

When a question arises in our courts, upon a transaction which has occurred in another state, and there is nothing to show what the law of that state is, and the transaction is of such a nature as to raise no presumption one way or the other, the court will follow the law of this state.

Where a loan is made in the state of Connecticut, at a greater rate of interest than is allowed by the laws of this state, but no greater than the legal rate in Connecticut, the fact that the note given by the borrower, for the amount of the loan, is made payable in this state, will not render the transaction usurious and the note invalid.

In an action here, upon such a note, the contract will be treated as a foreign contract, and the burthen of proof is upon the defendant, to show that the transaction is contrary to the laws of Connecticut.

APPEAL from a judgment entered upon the report of a referee. The action was upon a promissory note made by the defendant Bidwell, on the 20th of July, 1855, for \$738.92, payable to the defendant Parker, or order, eight months after date, at the Bank of New York, and indorsed by Parker. The following facts were found by the referee: That the promissory note sued on was signed by the defendant Bidwell, at the city of New York; that the defendant Parker there indorsed his name thereon as an accommodation indorser, for the use and benefit of said Bidwell; that the said note, when so signed and indorsed, was at said city of

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New York delivered to Jared W. Post, to get discounted for the use and benefit of said Bidwell at the city of New Haven, in the state of Connecticut, where said Post then resided; that afterwards, and on the 20th day of August, 1855, Post presented said note to the plaintiffs, (a banking corporation of the state of Connecticut,) at their banking house in the city of New Haven, for discount, and represented to the officers of said bank that the note was a regular business note which had been given by Bidwell for stock or property purchased by him from Parker, and asked for such discount for the benefit of said Parker; that the officers of said bank, relying upon such representations, offered to discount the note at the rate of twelve per cent per annum, if Post would indorse the same; that Post consented so to do, and thereupon indorsed the note, which was then discounted by the plaintiff, who reserved and retained out of the principal sum of \$739.67, the sum of \$52.92 for the discount of said note, and paid Post the balance; that the sum so retained was at the rate of twelve per cent per annum upon the principal mentioned in said note. There was no allegation that usury was committed against the laws of the state of Connecticut, and no evidence was offered of the laws of that state upon the subject of interest on the loan and forbearance of money. The referee found, as matter of law, that the transaction was not affected by the laws of this state against usury, and that the defendants had not, nor had either of them, established any defense against said note; and that the plaintiffs were entitled to recover the amount thereof, with interest.

Judgment was accordingly entered in favor of the plaintiff, for the amount of the note, with interest and costs; and the defendants appealed.

Mead & Taft, for the plaintiffs. I. To maintain their defense, the defendants must show that there was an agree-

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ment corruptly made between the plaintiff and the defendant Bidwell, that the plaintiff should loan to Bidwell said sum of \$686 for the time stated, and should take his note therefor, reserving thereupon for *interest* the sum of \$52.92. (2 R. S. 4th ed. 182, § 5. 2 Parsons on Contracts, 384, 405. N. Y. Firemen Insurance Company v. Ely, 2 Cowen, 704.) The case shows that there was no such agreement; that no such loan was made; that the note was not taken for a loan; and that no interest was reserved by or upon the note. The plaintiff discounted this note, as and for a business note, given by the maker to the payee for a consideration. Such a discounting of a note is a purchase of the note, and *not a loan of money*. The money paid is the *purchase price*, and *not money lent*, and of course the discount is *discount from the face of the note*, and *not interest*. (Cram v. Hendricks, 7 Wend. 569.) And although it turns out that, in fact, this note was not a business note, it does not make the money in the hands of Bidwell a *loan*, but *money had and received*, which the plaintiffs might have recovered back immediately after they discovered the falsity of the statements of Post made in that behalf. We invoke here another principle of law, to wit, the doctrine of estoppel, and say, that if the fact were otherwise than what we contend for, Post and Bidwell are estopped and concluded by the representations of Post as to the character of the note. Post is estopped by his own representations. (Truscott v. Davis, 4 Barb. 495.) Bidwell is estopped by the representations of Post, who was his agent. (Smith's Mercantile Law, 175. 2 Kent, 621, note, 7th ed.) And inasmuch as the note cannot be avoided for usury, by the maker, by reason of his being estopped so to do, Parker cannot show that the note was void because of usury between the plaintiffs and the maker of the note, and thus avoid his liability as indorser.

II. Could the defendants sustain the position that here was an agreement of loan and reservation of interest, they

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must further show that the same was made in violation of the laws of this state. But in this case, if there was a loan and reservation of interest, the agreement for the same and the loan itself were made, and the note, if given for a loan and interest reserved thereupon or thereby, was given in the state of Connecticut, under and in sole reference to the laws of that state, and without any reference to the laws of the state of New York, and consequently our statute against usury does not extend to the transaction. The note had its inception in the state of Connecticut. (*Powell v. Waters*, 8 *Cowen*, 669.) It had a legal, valid inception there. For aught that appears or is claimed, or alleged even in this case, the note was discounted at the established legal rate of interest of that state. If there is any law there rendering the note void in its inception, because of the rate of interest reserved thereupon or thereby, there is nothing in the case to show it, and the court cannot take judicial notice of such law, if any such there be. (*Pomeroy v. Ainsworth*, 22 *Barb.* 120. *Davis v. Garr*, 2 *Seld.* 134. *Jacks v. Nichols*, 5 *Barb.* 40. *S. C. on appeal*, 1 *Seld.* 184.) The note, therefore, had a legal and valid inception in the state of Connecticut; and if valid there, it will not be pronounced usurious under our law, because it was drawn payable in this state, and the rate of interest taken was greater than is prescribed in this state. (2 *Kent*, 575-7, *marginal page*, 459. *Chapman v. Robertson*, 6 *Paige*, 627. 2 *Parsons on Contracts*, 95. *Pratt v. Adams*, 7 *Paige*, 632. *Parsons on Mer. Law*, 22, and notes. *Pomeroy v. Ainsworth*, 22 *Barb.* 128 and 129. *Davis v. Garr*, 2 *Seld.* 134. *Jacks v. Nichols*, 5 *Barb.* 40. *S. C. on appeal*, 1 *Seld.* 184.)

Darlington & Hoffman, for the appellants. I. The contract upon which this action is brought, if made within this state, and to be performed here, is confessedly *illegal* and *void*. It is, moreover, a *criminal offense* by the laws of this state. It cannot, therefore, be made the subject of an action in our courts. (2 *R. S.* 182, §§ 5, 14, 15, 4th ed.)

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II. Assuming, for the moment, that this contract is to be governed by the laws of *Connecticut*, where it was made, and *not* by the laws of *New York*, where it was to be performed, the *onus* of averring and *proving* the law of *Connecticut* upon the subject of usury lay with the *plaintiffs*, and in the absence of such proof they are not entitled to recover. The plaintiffs, a foreign corporation, in seeking the aid of our courts to enforce a contract *illegal and criminal by our laws*, are bound to aver and prove *affirmatively* the facts which show this case to be an *exception* to the *lex fori*, as, for instance, that the contract was made elsewhere, and that by the law of the place where it was made it was legal and binding. (*Thatcher v. Morris*, 1 *Kern.* 437.) It is not incumbent upon the defendants to show that this contract, illegal by the laws of their own domicile and by the law of the *forum*, is also illegal by the law of the place where it was made. (*Id.*) The courts of this state, when called upon by a foreign creditor to enforce against our own citizens a contract confessedly illegal and void by our laws, will not *indulge* in *any presumptions* in favor of the foreign creditor, either that the contract was in fact made elsewhere, or that it was legal where it was made. (*Id.*)

III. In the absence of proof of the laws of another state where a contract, illegal by our laws but sought to be enforced in our courts, is alleged to have been made, the *legal presumption* is that the laws of that state *are the same as our own*. This must be so from the very *necessity* of the case, our courts in the case supposed having *no other rule* furnished them than the *lex fori* by which to determine the matters before them. This rule is well settled by authority, and is asserted and enforced as well upon grounds of natural reason and public policy as of necessity and positive law. (*Silleck v. French*, 1 *Smith's Am. Lead. Cases*, 519, note, 3d ed. *Robinson v. Dauchy*, 3 *Barb.* 20. *Sherrill v. Hopkins*, 1 *Cowen*, 103. *Starr v. Peck*, 1 *Hill*, 270. *Leavenworth v. Brockway*, 2 *Hill*, 201–3, note. *Legg v. Legg*, 8 *Mass.* 99. *Wood-*

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row v. O'Connor, 28 *Vermont*, 776. *Thatcher v. Morris*, 1 *Kernan*, 437. *Bowen v. Newell*, 2 *Duer*, 602-605. *S. C. affirmed*, 3 *Kernan*, 290. *Story's Confl. of Laws*, 1011, note 1, 5th ed. *Dale v. Hopkins*, *N. Y. circuit*, May, 1857. *Harper v. Hampton*, 1 *Har. & J.* 687, 710. *Forsyth et al. v. Baxter et al.*, 2 *Scammon*, 10, 12.)

IV. The note in suit was, however, dated in New York, made in New York, by parties resident there, and was in terms and on its face expressly *payable in the city of New York*. It was therefore, by every well settled rule and under all the authorities, a *New York contract*, and as such, no matter where sought to be enforced, but *especially in the courts of New York*, is to be governed, and its validity, obligation and effect are to be determined *solely by the laws of this State*. (*Robinson v. Bland*, 2 *Burrow*, 1077. *Story on Prom. Notes*, §§ 164, 165, 166. *Story on Bills*, §§ 129, 146, 147, 148, 149. *Story's Confl. of Laws*, 280, 292, 5th ed. *Edwards on Bills*, 177, 178, and cases cited. *Silleck v. French*, 1 *Smith's Am. Lead. Cases*, 519, notes. *Fanning v. Consequa*, 17 *John*. 511. *Sherrill v. Hopkins*, 1 *Cowen*, 103. *Jacks v. Nichols*, 3 *Sandf. S. C. R.* 313. *S. C. on appeal*, 1 *Selden*, 178. *Prentice v. Savage*, 13 *Mass.* 23. *Hyde v. Goodnow*, 3 *Comst.* 269. *Peck v. Mayo*, 14 *Vermont*, 33. *Dale v. Hopkins*, *N. Y. circuit*, May, 1857, before Justice *Sutherland*.)

V. The proposition asserted by the referee, in his opinion, that parties contracting in one state for a loan of money to be repaid in another, may agree for the rate of interest allowed by either, must be understood with this important qualification, that if the contract is illegal and void by the law, either of the place where it is made or of that where it is to be performed, it is void in *both* places, and can be enforced in neither. (*Edwards on Bills*, 178, and notes. *Andrews v. Herriot*., 4 *Cowen*, 510. *Note a and cases cited in subdivision 1. Hyde v. Goodnow*, 3 *Comst.* 269.)

VI. The taking of more than the legal interest being by

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law a *criminal offense*, the doctrine of estoppel, insisted on in this cause, and applied by the referee as against the defendant Post, should not, on principles of public policy, be permitted to operate. Estoppels are not favored in any case, their effect being to shut out the truth; and, in cases of this nature, they are especially objectionable. They operate by indirection to repeal, in effect, the statute of usury. They are against public policy, allowing the very object and aim of the law to be frustrated and evaded by a device so simple and convenient that it can be resorted to on all occasions. In cases of this description they operate with a demoralizing effect, which the law should and does abhor, offering a *bounty upon falsehood*, and suggested to parties already contemplating an offense against the law, that they may escape the consequences of their illegal acts, simply by *adding to the legal offense of usury the moral sin of lying about it*. (See remarks of Marvin, J., in *Truscott v. Davis*, 4 Barb. 500.)

VII. The referee erred in his finding on matters of law, and his report should be set aside and judgment rendered for the defendants. This court has the power not only of altering partially the judgment appealed from, but of substituting in its place the exact judgment which the court below, upon the facts found, should have rendered. (*Marquat v. Marquat*, 2 Kern. 336.) In this case there is no conflict of testimony, nor any doubt as to the facts; nor is there any suggestion that the facts can be altered upon a second trial. The questions in dispute are questions of law only, and must eventually be resorted to as decisive of the controversy. If on these the defendants are right, they should not be subjected to the further trouble and expense of a new trial. No good can result from this to either party. (*Id.*)

By the Court, PRATT, J. When a question arises in our courts upon a transaction which has occurred in another state, and there is nothing to show what the law of the state where

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the transaction occurred is, and the transaction is of such a nature as to raise no presumption one way or the other, our courts would undoubtedly follow the law of this state. Take the case of a contract made and to be performed in another state, in an action upon such contract, in the courts of this state, in the absence of proof in regard to the legal rate of interest in the place where the contract was made, our courts, I think, would be authorized to give interest according to the law of this state. (2 *Hill*, 201.) In such case there would be no presumption arising from the transaction itself, and in the absence of all other presumptions the courts might presume that the *lex loci* was not different from ours. But there is a general principle of law, that courts will not presume the commission of crime, or the existence of a state of facts which would operate as a forfeiture of property or rights; and this presumption is not confined to proceedings instituted with a view of punishing the supposed offense, but holds in all civil suits where it comes collaterally in question. (*Best on Presumptions*, 64, 65.) Assuming, therefore, this to be a contract of another state, it is claimed in this case, in the absence of all proof, that the courts should presume that the laws of that state are such that the note should not only be held void, and the lender forfeit the money actually loaned, but that he was also guilty of a misdemeanor. This, in my opinion, would be reversing a well settled principle of law. A party will not be presumed guilty of crime, in the absence of proof. Treating this, therefore, as a foreign contract, the burden of proof was upon the defendant, to show that the transaction was contrary to the laws of Connecticut.

It is claimed that the note being made payable in New York, the question must be determined by the laws of New York. If the thing to be done on the face of the contract was contrary to the laws of New York, the rule that the law of the place of performance must control, might perhaps apply. But in this case the loan was clearly made in Con-

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necticut, and the excessive interest was taken there. If, therefore, no more interest was taken than the law of Connecticut allows, it surely cannot be illegal to agree to repay it in New York. (7 *Paige*, 662.)

Judgment affirmed.

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ELLISON vs. PECARE and others.

Where, subsequent to the execution of a mortgage, the premises covered by the mortgage are sold by the mortgagor, in separate parcels, to different purchasers, who have no notice of the mortgage, one of whom takes a conveyance executed and delivered prior to the giving of the deed to the other, while the latter conveyance is first recorded; in an action to foreclose the mortgage, the purchaser whose deed is first *executed* and delivered takes precedence over him whose deed is first *recorded*; and he has the prior equity, in respect to the order in which the several parcels shall be sold.

APPEAL from a judgment entered at a special term, for the foreclosure of a mortgage and sale of the mortgaged premises. The question was as to the order in which the several parcels of land, which had been sold and conveyed, by the mortgagor, to different purchasers, at different times, should be sold, under the judgment of foreclosure. The special term decided that Hesser, the purchaser whose deed was first recorded, had the prior equity, as against Pecare, whose deed was first executed and delivered.

By the Court, PRATT, J. This is an action to foreclose a mortgage upon premises sold in separate parcels to different purchasers, subsequent to the execution of the mortgage. The question now in litigation arises between the defendants Pecare and Hesser, claiming under different deeds of conveyance,

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in regard to the order in which the different parcels of the mortgaged premises shall be sold. The conveyance under which Pecare claims was first, in the order of time, executed and delivered, while Hesser's deed was first put upon record. Both defendants aver in their answer that they had no knowledge of the mortgage at the time of their purchase, and both conveyances contained full covenants of warranty. The court at special term adjudged that Hesser, who had his deed first recorded, had the prior equity.

It is a well acknowledged principle of equity, that the first purchaser of a portion of premises subject to a prior mortgage, is entitled to have the remainder of the premises sold first to satisfy the mortgage. But this is a mere equity, and is not an interest in lands which is subject to the provisions of the recording act. The recording act, *ex proprio vigore*, cannot affect such a case. It is possible that, through the actual notice which a person might receive by means of the record of a deed or mortgage, his equity might be lost, but nothing of that kind is claimed in this case.

In this case, the party under whom Pecare holds, was by his purchase invested with an equity to have the holder of the mortgage, in the first place, exhaust his remedy against the unsold portions of the lot before resorting to that conveyed to him. Now, how has he been divested of such equity? He lost nothing by the mere fact of not having his deed recorded, for the statute does not apply to an interest of this kind. If he has lost it at all, it must be in consequence of some actual equity with which some one else has become invested, superior to his. But Hesser avows in his answer that he did not know of the mortgage, at the time of the purchase. If that be so, it would have made no difference with him if Pecare's deed had been on record. I am therefore utterly unable to perceive how he has any equity superior to Pecare's, and the latter, being prior in point of time, takes precedence. It is not necessary to decide what would have been the result if Hesser had known of the mortgage, and had consequently

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examined the record to see if any other portion of the premises had been sold, and finding no record of any other conveyance, had been induced to buy, supposing in good faith that he was the first purchaser. In such case there would have been some show of equity; whether superior to that of Pecare or not, it is not necessary to declare. In this case, there is no pretense of his being misled by the want of this record, or that his condition is in anywise different from what it would be if the deed had been recorded.

The judgment should therefore be modified in accordance with the finding of the referee, with costs, to be paid by Hesser.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Ingraham and Pratt*, Justices.]

THE REFORMED PROTESTANT DUTCH CHURCH OF WESTFIELD,
STATEN ISLAND, *vs.* SUSAN D. BROWN, Executrix, &c.

Where a subscription paper for the erection of a church edifice, containing certain conditions, was signed by B., who, during the erection of the building repeatedly told those in charge of the work to go on and finish the edifice, and he would pay his subscription; *Held* that this was a sufficient waiver of the conditions in the subscription; and that the fact that the society, on the faith of these promises, and similar promises from others, went on and finished the edifice, constituted a sufficient consideration to sustain the promises.

A promise, made for the benefit of a society thereafter to be incorporated, but before it is *in esse*, is valid and binding; and upon the subsequent incorporation of the society it can maintain an action upon the promise; especially where a portion of the work constituting the consideration is done subsequent to the incorporation.

A PPEAL by the defendant, from a judgment entered upon the report of a referee. The action was brought against the defendant as executrix of David Brown, deceased, to recover \$500 upon a subscription by the testator for the erection of the church edifice of the plaintiffs; also \$100 subscribed

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by him towards the salary of the minister. The referee, by his report, found the following facts: That the plaintiffs are a religious society duly organized and incorporated, according to the laws of this state, as "The Reformed Protestant Dutch Church of Westfield, Staten Island." That David Brown was, on or about the 26th day of February, 1849, indebted to the plaintiffs in the sum of \$600, as follows: \$500 upon and as a subscription to build a house of worship for the plaintiffs, the Reformed Protestant Dutch Church of Westfield, Staten Island, which sum the said David Brown promised and agreed to give and pay towards the erection and building of the said church edifice, and the sum of \$100 a year for the support and maintenance of a minister of the gospel, for said church; that afterwards, and after the church edifice had become nearly completed, the said Brown again promised and agreed to give and pay towards the erection and building of the said church edifice the sum of \$500, and the said sum of \$100 a year for the support and maintenance of a minister of the gospel for said church, and expressly waived the operation and force of a clause in an article of agreement or statement made and signed on the 9th day of April, 1849, in relation to the indebtedness of the church. That the said David Brown was repeatedly called upon to pay to the plaintiffs the sum of \$600, but did not pay the same. That the plaintiffs were legally incorporated as a church, on the 11th day of September, 1849, and the act of corporation and certificate of election of officers of the church or society was duly and legally acknowledged, and was recorded on the 31st day of June, 1851, in the office of the clerk of Richmond county, and that the original formation of the said society and subscription was on the 26th day of February, 1849. That the said church was so completed and used, as was intended, for public worship, a minister employed, and the society was free from debt, within the meaning of the article of April 9, 1849, signed by David Brown and others. That said Brown had departed this life, leaving sufficient assets to pay all debts owing by him, and that on or about

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the 3d day of February, 1853, letters testamentary on his estate were granted and committed unto his widow, Susan D. Brown, executrix named in the last will and testament of said David Brown, deceased. And that such executrix entered upon her duties as such, was duly qualified, took possession of the goods, chattels and credits of said David Brown, deceased, according to law, and that she had sufficient money in her possession, arising from the estate of the said David Brown, deceased, to pay all debts due from the estate; and that the plaintiffs' demand, as set forth in the complaint, had been repeatedly presented to said executrix for payment, and payment demanded, previous to the commencement of this action, and that she had neglected and refused to pay the same; and that there is now due from Susan D. Brown, executrix of David Brown, deceased, to the plaintiffs the sum of \$959.33, for principal and interest, as claimed in the complaint. From the facts so found and reported by him, he decided and reported as matters of law, that the plaintiffs were entitled to judgment against the defendant, as such executrix, for the sum of \$959.33, together with costs. For which sum judgment was entered, at a special term, in favor of the plaintiffs.

J. S. L. Cummins, for the appellants.

John Fitch, for the respondent.

By the Court, PRATT, J. In this case it does not appear that any promise was made by the defendant's testator to pay his subscription, after the plaintiffs were actually and legally incorporated. But it does appear that after the society had made a preliminary organization, and after the articles of association had been executed, the testator frequently told those in charge of the erection of the church edifice to go on and finish it and he would pay his subscription. This was clearly a sufficient waiver of the conditions in the original subscription. And the fact that the society, on the faith of this

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promise and similar promises from others, went on and finished the church edifice, constitutes a sufficient consideration to sustain these promises.

The only remaining question, of any moment, is, that the plaintiffs had no legal existence at the time of the testator's making the promises upon which the action is predicated. It is claimed that such being the fact, the plaintiffs could not be a party to the contract. But it has been repeatedly held that a subscription made before the corporation was *in esse*, with a view to a future incorporation, was binding, and that a corporation subsequently organized could sustain an action upon it. (*Hamilton and Deansville Plank Road Co. v. Rice*, 7 Barb. 157. *Stanton, Pres't, v. Wilson*, 2 Hill, 153. *Trustees of Farmington Academy v. Allen*, 14 Mass. Rep. 172.) In this case the promises were made for the benefit of the society thereafter to be incorporated. All parties contemplated the subsequent incorporation of the society, and although the promises were made just before such incorporation, yet a portion of the work was done afterwards. Upon such incorporation, therefore, the society became vested with the claims against those who had agreed to pay for erecting the church edifice. I think, therefore, that the judgment should be affirmed.

Judgment affirmed.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Ingraham and Pratt*, Justices.]

COLBY *vs.* OSGOOD.

The right to further assurance, when stipulated for, passes to the successive grantees. It is a covenant that runs with the land, and as a consequence is assigned by a conveyance of the land.

Where a grantor conveys land with full covenants of seisin, warranty, right to convey free from incumbrances, and for further assurance; the covenants being made with the grantee, his "heirs and assigns;" and the grantee subsequently conveys the land to another, the latter may maintain an action, in his own name, against the grantor, for a breach of the covenant against incumbrances, in the existence of a mortgage which was a lien upon the premises at the time of the original conveyance.

A release of a mortgage is a "further assurance."

THIS action was brought for the recovery of \$10,828 ¹⁰⁰/₁₀₀, with interest from the 12th day of March, 1855, for a breach of the covenants contained in a deed of conveyance of a house and lot in the city of New York. The plaintiff derives title from the defendant, through Samuel Smith, who was the defendant's grantee, and the plaintiff's grantor, of the premises in question. The breach of covenant complained of consists in a mortgage given by the defendant, while owner of the premises, to one Edwin Snyder, and which remained an existing incumbrance upon the premises until after the conveyance to the plaintiff, who was compelled to remove it, in order to prevent a foreclosure and sale, by paying the amount claimed in this action. At the hearing before the referee, the defendant's counsel moved, *in limine*, to dismiss the complaint on two grounds: 1. That an assignee of a grantee of land cannot maintain an action in his own name for a breach of the covenant against incumbrances. 2. That the breach of covenant was insufficiently assigned in the complaint. The referee granted the motion on the first ground, and dismissed the complaint. The plaintiff excepted to the rulings and finding of the referee, and from the judgment entered upon the report of the referee, the plaintiff appealed to the general term.

H. E. Smith, for the appellant. I. The doctrine that has obtained in this state, and several states of the union, that

an assignee of a covenantee in a conveyance of real estate, cannot maintain an action in his own name for a breach of the covenants against incumbrances, of seisin, and right to convey, is founded solely upon the technical rule against the assignment of a *chose in action*, and not, as the referee supposes, from the want of privity of estate or contract. (1.) In all the adjudicated cases, and elementary treatises, the doctrine is placed upon the ground of the technical rule. (4 *Kent's Commentaries*, 471, 472, 5th ed. *Rawle on Covenants for Title*, 344, 345, 2d ed. *Greenby et al. v. Wilcocks*, 2 *John.* 1. *Fowler v. Poling*, 2 *Barb. S. C. R.* 300. *Sprague v. Baker*, 17 *Mass.* 586. *Clark v. Swift*, 3 *Metc.* 395.) (2.) Since the statute *quia emptores*, which abolished sub-infeudation, upon a conveyance in fee which leaves no reversion in the donor, there is, properly speaking, and can be, no *privity of estate* between the grantor and the assignee of the grantee. Before the statute, it was the *reversion*, or *possibility* of reverter, that created privity of estate; and since the statute, the *want* of reversion, or possibility of reverter, destroys that privity. (*Rawle on Covenants for Title*, 341, 2d ed. *Am. Notes to Spencer's case*, 1 *Smith's L. C.* 108, 109, 112. *Bingham & Colvin on Rents, Covenants, &c.* 240. *Townsend v. Morris*, 6 *Cowen*, 123. *De Peyster v. Michael*, 2 *Seld.* 467.) (3.) The ordinary covenants in a deed, though some of them are often denominated real covenants, are in fact all personal covenants, and consequently choses in action. The doctrine that any of these covenants run with the land, is an exception to the old common law rule that choses in action are not assignable. The law now, for wise reasons, permits their transfer with the land, as incidents, when they are in their nature capable of running with it. What shall constitute a capacity for running with the land has been established somewhat arbitrarily, but firmly: it depends upon two conditions; first, the covenant must be about or affecting the land; and second, it must be for the

benefit of the land. (*Am. Notes to Spencer's case*, 1 *Smith's L. C.* 135, 136, 99. *Rawle on Covenants for Title*, 340, 341, 342, 343, 2d ed. *Norman v. Wells*, 17 *Wend.* 136. *Allen v. Culver*, 3 *Denio*, 284. *Plymouth v. Carver*, 16 *Pick.* 183. *Taylor v. Owen*, 2 *Blackford's Ia. R.* 301. *Bingham & Colvin on Rents, Covenants, &c.* 65. *Vernon v. Smith*, 4 *Barn. & Ald.* 1. *Bally v. Wells*, 3 *Serg. Wils.* 25. *Vyvyan v. Arthur*, 1 *Barn. & Cress.* 410. *Hurd v. Curtis*, 19 *Pick.* 449. *Townsend v. Morris*, 6 *Cow.* 123. 4 *Kent's Com.* 472, note a, 5th ed. *Spencer's case*, 2d, 3d and 4th resolutions, 1 *Smith's L. C.* 23.) (4.) It is a settled doctrine, that on the question whether a particular covenant runs with the land, and passes to the assignee, it makes no difference whether the covenantor be the person who conveyed the land or a mere stranger. Between a stranger and an assignor there can of course, strictly speaking, be no privity of estate. The only privity that can, in such case, exist, is that which results from the capacity of the covenant to run with the land; and this capacity, since the statute *quia emptores*, as before shown, depends upon two conditions: first, that the covenant shall be about or affecting the land; and second, that it shall be for the benefit of the land. (*Packenham's case*, 42 *Edward III.*, 3, cited in *Spencer's case*, 1 *Smith's L. C.* 95. *Rawle on Covenants for Title*, 342, 2d ed. *Norman v. Wells*, 17 *Wend.* 150, 151. *Am. Notes to Spencer's case*, 1 *Smith's L. C.* 108.)

II. From the foregoing positions and authorities, it is difficult to perceive any sound reason for the rule that the covenant against incumbrances does not pass to the assignee. It is no more a personal covenant than all the covenants in a deed; and if it be a chose in action, so are all the rest since the statute *quia emptores*. The doctrine that any of them run with the land, so as to give a right of action to the assignee, is an exception to the common law rule against the assignment of choses in action. Within this exception, the covenant against incumbrances has all the conditions con-

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ferring capacity to run with the land: it both concerns, and is for, the benefit of the land. (1.) The reason assigned for the rule is, that this, and the covenants of seisin, and right to convey, are covenants *in presenti*, and if not true, are broken as soon as made, and immediately become mere choses in action, incapable of assignment. But we have before seen that all the covenants in a deed are choses in action, whether broken or kept, and hence the reason assigned for the rule shows its absurdity. In *Greenby et al. v. Wilcocks*, (2 John. 6,) Livingston, J., in an able dissenting opinion, significantly says: "It might be asked, what makes a covenant more a chose in action after than before its breach?" (2.) A more specious reason for the rule would seem to be, that, as covenants pass, not by direct assignment, but as incident to the estate, in those cases where the breach is total, and the damage complete as soon as executed, if the covenant be untrue—as in covenants of seisin and right to convey—the covenant is severed from the estate, and becomes a mere personal right of action for the damages, which passes to the executor, and not to the heirs or assigns, with the land. But, if this were the reason by which the rule is vindicated, then a distinction should be made between cases where the damage is complete and accrues to the first grantee, and those in which, though there may be a mere technical breach to the first grantee, yet the real damage is sustained by the assignee. This distinction is made by the English courts, but it has been ignored by ours. (*Rawle on Covenants for Title*, 344, 345, 2d ed.) (3.) Our courts generally have adopted the rule in question with great reluctance, especially as applied to the covenant against incumbrances, and only in obedience to what has been supposed to be the strict technical common law rule, as laid down in *Lewis v. Ridge* (Cro. Eliz. 863.) That case has either been misunderstood this side of the Atlantic, or our courts present the anomaly of following an English decision which is repudiated by the English courts. Upon examination it will appear that the case of *Lewis v. Ridge* does not

support the position based upon it, and is not in conflict with the more recent English decisions. The covenant was that the land "should be discharged, within two years, of all statutes, charges and incumbrances, excepting the estate for life:" breach, that the statute was extended. The covenant was to do a thing certain within a specified time, and execution had issued upon the statute; the land was actually extended; the covenant was, therefore, finally and as completely broken at the expiration of that time as it could be, and the damage was complete. (*Rawle on Covenants for Title*, 356, 357, 358, 2d ed.)

III. But whatever may be the rule and the reason for it, either in England or America, in courts of law, there has never been any difficulty about the matter in equity, where assignments of choses in action have always been held valid; and the common law courts, in modern times, have acted upon the same principle, and permitted the assignee to maintain an action in the name of the assignor. This doctrine, in its application, has embraced covenants that are said not to run with the land at common law—including the covenant against incumbrances—and treated the assignee of the land as the equitable assignee of the covenant, by virtue of the transfer of the land, without any direct or specific assignment of the covenant. (*Rawle on Covenants for Title*, 383, 384, 2d ed. 2 *Story's Eq. Jur.* §§ 1040, 1047. 1 *Parsons on Con.* 193, 2d ed. *Clark v. Swift*, 3 *Metc.* 395. *Sprague v. Baker*, 17 *Mass.* 586. *Thayer v. Clemence*, 22 *Pick.* 493. *Redwine v. Brown*, 10 *Georgia R.* 318. *Am. Notes to Spencer's case*, 1 *Smith's L. C.* 122. *Nesbit v. Brown*, 1 *Dev. Eq. R.* 30. *Thompson v. Rose*, 8 *Cow.* 266. *Alexander v. Schrieber*, 13 *Miss. R.* 271. *Chaplain v. Briscoe*, 11 *Smedes & Marsh.* 377. *Thornton v. Court*, 17 *Eng. Law and Eq. R.* 231. *Riddell v. Riddell*, 7 *Simons*, 529. *Murray v. Jayne*, 8 *Barb.* 612, 616.)

IV. The code of procedure blends the two systems of law and equity, and permits an action to be brought in the name

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of the assignee, and thus removes the technical difficulty that has driven our courts of law into a series of decisions which they made with reluctance, and from a supposed necessity growing out of the rule against the assignment of choses in action. If, therefore, an assignee of the land who has suffered from the breach of covenant against incumbrances, be an equitable assignee of the covenant, or of the right of action for such breach, then this action is rightly brought in the name of the present plaintiff. (*Code of Procedure*, §§ 69, 111. *Rawle on Cov. for Title*, 383, 384, 2d ed.) (1.) The referee held that the action would be maintainable as an equity proceeding, if the pleadings were properly framed; and that it might be maintained in its present form, if the plaintiff had a specific and independent assignment of the right of action from Smith, his grantor. To this it may be replied: 1. That all the authorities which hold that the assignee of the land is the equitable assignee of the covenant, treat him as such assignee by virtue of the transfer of the land, and do not require a specific and independent assignment of the cause of action. 2. That if the assignee of the land could maintain an equity proceeding against a remote grantor, without a specific assignment of the cause of action, then it follows that the right of action passes with the land as an incident, and that the doctrine that an assignee cannot maintain an action in his own name in the common law courts, on a certain class of covenants, is founded upon the technical rule against assignments of choses in action, and not, as the referee holds, on the ground that there "is no privity of estate or of contract between the parties." 3. The equitable interest in a chose in action may be assigned by a mere delivery of the evidence of the contract. (1 *Parsons on Cont.* 197, 2d ed.) (2.) The rule that choses in action are not assignable at common law, now means only that they can be recovered in no other name than that of the original owner. This appears from the fact that courts will protect the rights of the assignee, on due notice of the assignment. It ought to follow, therefore, that

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under the code choses in action are assignable, and the technical rule abrogated. (3.) An argument in favor of the technical rule, supposed to be established by *Lewis v. Ridge*, and followed by our courts, has been drawn from the nature of the covenant of seisin. As covenants which possess the capacity of running with the land do not pass by direct assignment, but as incident to the land to which they relate, it is said that in case of the covenant of seisin, when untrue, no land passes to the grantee and his assignee, and of course no covenant passes as an incident. If this be true of the covenant of seisin, it is equally true of the covenants for quiet enjoyment and of warranty, and ought, for the same reason, to destroy their capacity for running with the land. But it is not true of the covenant against incumbrances, for, although untrue when made, an estate passes to the assignee. To meet this difficulty as to covenants of warranty, and for quiet enjoyment, it was held in *Beddoe's Executor v. Wadsworth*, (21 Wend. 120,) that a transfer of the possession is sufficient to pass these covenants to the grantee and his assignee. It was also held that covenants pass by release and quit-claim, as well as by bargain and sale, or lease and release.

V. The doctrine that the covenant against incumbrances does not run with the land, so as to give the assignee a right of action in his own name for the breach, where he has been the only sufferer, has been adopted with reluctance, and operates so inconveniently and unjustly, that courts ought to favor its abrogation. (1.) It is a well established rule, that in an action for a breach of this covenant, the plaintiff can recover only nominal damages, where he has not removed the incumbrance, nor been evicted. The covenant is treated as a covenant of indemnity, and until a party has actually sustained an injury, he is not entitled to recover damages. (*Rawle on Covenants for Title*, 155, 2d ed. *Baxter v. Ryerss*, 13 Barb. 267, 281. *Bemis v. Smith*, 10 Metc. 194.) Now, in the case at bar, if Smith, the defendant's grantee, had brought suit, he would have recovered just six cents damages, and been

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mulcted in costs. But he assigned to this plaintiff, who was compelled to pay ten thousand dollars to remove the incumbrance, and now it is said that Colby cannot recover of the defendant without a specific assignment from Smith of his six-penny right of action. If it be said that Colby has his action against Smith, it may be asked in reply, what if Smith be hopelessly insolvent? Moreover, why multiply actions when the substantial rights of the parties can be disposed of in this action? (2.) Suppose Smith had brought his action, and obtained a judgment for the technical breach of the covenant, before paying off the incumbrance, and had afterwards paid off the incumbrance, would he have had another action for the damages sustained? If yea, then it would tolerate the practice of splitting a demand, and allow two actions where one would answer all the purposes of justice. If nay, then the technical right of action, to which so much importance is attached by the other side, is a right the exercise of which would be visited by a forfeiture of the substantial rights of the party. (3.) If this plaintiff should now take a specific assignment from Smith of his valuable chose in action—which, it is said, in case of his death would pass to his executor—and bring an action upon it against this defendant, what would he be entitled to recover? Beyond doubt, he would recover what was thus assigned him, namely, six cents, and the privilege of paying costs; but on what principle he would be entitled, in virtue of such assignment, to recover the ten thousand dollars by him paid, does not very clearly appear. (4.) Covenants were introduced originally to succeed the ancient warranty, which was strictly a covenant real, and could never be taken advantage of by personal representatives. It has generally been supposed that their introduction “was intended rather to extend the remedy—both by means of the more pliable form of the action of covenant, and by giving indemnity in the shape of damages—than to alter materially the rights and relative positions of those who might seek to take advantage of them.” But if the doctrine contended for

on the other side be carried out, their original purpose would be essentially and unfortunately perverted. (5.) In several states of the union the English rule obtains; in Maine the right of an assignee to maintain the action has been declared by statute; and some of the best elementary writers maintain the same doctrine, holding that the assignee—if he be the party actually damnified—may have an action, either in his own name, or in the name of the assignor. (*Rawle on Covenants for Title*, 350, 383, 384, 2d ed. 2 *Hilliard on Real Property*, 393, 57, 2d ed.)

VI. The breach of covenant is sufficiently assigned in the complaint, and so the referee found. The complaint sets out the several conveyances *in hæc verba*, alleges the incumbrance complained of, and the payment thereof by the plaintiff, in order to prevent his premises from being sold under the mortgage. In brief, all the facts necessary to maintain the action are set forth, and under the code this is all that is requisite; more than this would be vicious pleading. (*Code of Procedure*, § 142. *Clark v. Harwood*, 8 *Pr. R.* 472.)

N. Dane Ellingwood, for the defendant. I. The deed from the defendant to Smith contains a covenant against incumbrances, and no reservation in it was made of the mortgage in question. That covenant was consequently broken as soon as made and became from that time a mere right in action, upon which Smith alone could bring a suit. (1.) Smith might have assigned that right of action to one and conveyed the real estate to another; or (2.) Supposing that no assignment of it had been made, specifically, and Smith had died intestate, this right of action would have passed to his personal representatives and not to his heirs.

II. The deed executed by Smith, bearing date the 9th day of May, 1854, and delivered to the plaintiff, although it passed the estate in fee, did not pass to the plaintiff this right of action. A covenant broken does not run with the land. (*Rawle on Covenants*, 350.)

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III. This rule of law is well established, and the present being an action at law, must be governed by it.

IV. No other rule could be allowed to prevail even in equity, under the circumstances of the present case. (1.) The plaintiff took a covenant against incumbrances, from Smith, in his deed bearing date the 9th day of May, 1854, and having constructive notice of the existence of the mortgage executed by Osgood, uncanceled of record, it is to be presumed that he relied upon that covenant. (2.) Osgood has an equitable defense as against Smith, which he could not have as against Colby. (*Rawle on Covenants*, 376. *Suydam v. Jones*, 10 *Wend.* 180.)

V. The plaintiff in this suit has no such interest in the broken covenant as to enable him to maintain an action upon it against the defendant.

By the Court, ROOSEVELT, J. In 1853—after the code went into operation—Osgood, the defendant, in consideration of \$30,000, conveyed a certain house and lot, with the furniture, in 17th street, to one Smith, with full covenants of seisin, warranty, right to convey free from incumbrances, and for further assurance. The covenants, as usual, were made in terms, not only with Smith, but with “his heirs and assigns.” In the following year, to wit, in May, 1854, Smith, the grantee, for the same consideration and with the same covenants, conveyed the premises to Colby, the plaintiff in this suit. Osgood, it appears, before his sale to Smith, had mortgaged the lot to one Snyder, for \$10,000, who, in December, 1854, commenced a foreclosure against Colby, and compelled him to pay the \$10,000, besides a large amount in addition, for interest and costs, which Colby now seeks to compel Osgood to refund. Colby, it is conceded, has a remedy against Smith, and Smith against Osgood, for reimbursement. The question is, can Colby, passing by Smith, sue Osgood, Smith’s grantor; or must he sue Smith, and let Smith sue Osgood?

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The referee held that Osgood's covenant was broken the moment it was made; and that it was competent, under the code, to assign a broken covenant; but that in this case no such assignment had been made. In these views the referee, we think, partially erred.

First. The answer itself alleges that, simultaneously with the execution of the first deed, a sealed agreement was entered into, which recognized the mortgage, and qualified the effect of its existence as an immediate incumbrance, by allowing it to remain, by consent, unpaid till the 1st of November, 1854. There was therefore no breach in that respect of the covenants, or either of them, until after Smith's conveyance to Colby.

Second. The complaint sets forth the whole deed of the defendant, *verbatim*, including the covenant for further assurance. It therefore lays the foundation of a claim for a release of the mortgage, or payment of its equivalent in damages. A release of a mortgage is a "further assurance;" and the right to further assurance, when stipulated for, passes to the successive grantees. In other words, it is a covenant that "runs with the land," and as a consequence is assigned by a conveyance of the land. It may be that in this view of the cause of action, a demand should first have been made. No objection, however, was taken, in the answer, or on the argument, for the want of such demand. The defense was placed on the single position that the *plaintiff* had no right to make any demand, whether before suit or by suit; that the cause of action had never been assigned to him, but belonged, still, to the original covenantee; that the conveyance to him, by the covenantee of the lands, did not pass the right of action on the covenants, which, it was assumed, had been previously broken. The covenant for further assurance appears to have been overlooked. *That* clearly had not been broken before the conveyance. In its nature it was prospective; and although, in its legal effect, it might, in the present case, give to the party injured the same amount of damages as the covenant against

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incumbrances, it still was not the same covenant. (4 *Kent*, 473.) It ran with the land, even if the other covenant did not; and it carried the other covenant with it.

On both grounds, the dismissal of the complaint was erroneous, and the judgment should be reversed, and a new trial ordered; costs to abide the event.

Ordered accordingly.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Pratt and Clerke, Justices.*]

ANDREWS, administrator of Blanchard, *vs.* WALLACE,
administrator of Fairchild.

Where a claim against an estate is disputed by the executor or administrator, the surrogate has no jurisdiction to try the validity of such claim, on the petition of the creditor.

A decision made by the supreme court, at a general term, held in one of the districts, should be respected by the courts in other districts; unless in some special case, and for special reasons, a court feels compelled to depart therefrom. *Per* INGRAHAM, J.

And two successive decisions, concurring on the same point, made at general terms in different districts, should be treated as authority, in other districts, until reversed by a higher tribunal. *Per* INGRAHAM, J.

APPEAL from an order made by the surrogate of New York, upon the petition of Gardner P. Andrews, administrator of Blanchard, allowing the claim of the petitioner against the estate of Fairchild, deceased.

By the Court, INGRAHAM, J. The question submitted to us on this appeal is whether the surrogate has jurisdiction, on the petition of a creditor, to try the validity of his claim, when disputed by the executor or administrator. The surrogate in this case assumed to do so, and decided against the administrator, who now appeals to this court. It must be conceded that there is no express authority in the statutes authorizing such

a trial. There are cases where the surrogate has limited powers to make the investigation as to disputed claims ; but none of those cases extend to a case like the present. In 3 *R. S.* (5th ed.) p. 188, 9, §§ 13, 16, such power is given to the surrogate ; but that is in a case where the executor or administrator applies for leave to sell real estate to pay debts, and where, of course, he admits the debt to be valid. In such a case the heir or devisee is permitted to deny the validity of the claim to show that the real estate should not be sold, and the surrogate's decision only applies to that question.

In 3 *R. S.* p. 182, § 78, a like power is given after a final accounting to settle as to the claims of creditors, legatees, &c. ; but it may well be doubted whether such authority even there, is given to try the validity of a claim which is totally rejected by the executor.

In 3 *R. S.* p. 175, the provisions for a reference of disputed claims show that the legislature did not intend to place the trial of them under the control of the surrogate ; for, in such cases, the statute requires the agreement to refer to be filed in a law court, and the proceedings thereon to eventuate in a judgment in that court, before the surrogate can act in directing its payment.

The case of *Fitzpatrick v. Brady*, (6 *Hill*, 581,) relied upon by the respondent, merely holds that the proceeding before the surrogate on petition of a creditor to anticipate payment of a claim before eighteen months had expired after letters testamentary, necessarily involved an examination as to the validity of the claim, for the purpose of deciding as to the propriety of granting the order asked for ; but the same case holds that such examination is not binding upon the parties and only concludes the creditor as to his application to anticipate the payment, leaving him to his action at law to enforce the debt if disputed by the executor or administrator.

The case of *Kidd v. Chapman*, (2 *Barb. Ch. Rep.* 414,) was upon a judgment against the testator, and the decision in that case has been considered as not based on a reference to

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the statutes above referred to. In *Wilson v. Baptist Educ. Society*, (10 Barb. 308,) the correctness of that case is doubted, and Justice Brown there held that the surrogate had no authority to take cognizance of a disputed claim, on the application of the creditor.

In *Magee, adm'r &c. v. Vedder*, (6 Barb. 352,) the general term at Albany held expressly that the surrogate had no power to decide upon the validity of a claim against an estate, where such claim is disputed by the executor. The full examination of the question in that case, by Mr. Justice Harris, seems to render any further discussion at this time unnecessary.

In *Disosway, adm'r, v. The Bank of Washington*, (24 Barb. 60,) the same doctrine was held by the Monroe general term; and the court there say that the provisions of the statute only apply to undisputed claims, and that the legislature intended that the power to adjudicate upon the validity of a debt claimed against the estate of a testator should remain exclusively with the courts of law and equity, where it appropriately belongs.

With these decisions we concur; but if we doubted the correctness of either of them, we think that two successive decisions of general terms concurring on the same point, in different parts of the state, should be treated by us as authority, until reversed by a higher tribunal. It is a co-ordinate branch of the same court, and uniformity of decision throughout the state is so desirable as to call for respect by the general terms in the different districts for the decisions of each other; unless in some special case, and for special reasons, a court feels compelled to depart therefrom.

The order appealed from should be reversed.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Ingraham and Pratt, Justices.*]

JONES vs. THE TERRE HAUTE AND RICHMOND RAIL ROAD COMPANY.

Prima facie all stockholders in a corporation, at any particular period, are equally interested in the property and business of the corporation. *Per* INGRAHAM, J.

And when the directors undertake to distribute among the stockholders any portion of the funds or property of a corporation—whether it be called profits or not—all the then stockholders are entitled to an equal share in the fund, proportionate to their stock; whether they have been stockholders for a longer or shorter period. *Per* INGRAHAM, J.

Unless the charter gives the directors power to discriminate between the stockholders at different periods, in the distribution of profits, they are all entitled to share therein.

Where, by a resolution of the board of directors, a dividend is made to the persons then holding stock, without any discrimination, out of the surplus earnings of the corporation for a given period, payable at a future day, all who are stockholders on the books of the company, at the time the dividend is declared, are entitled to share therein.

It seems that a board of directors, in making a dividend, cannot limit it to persons holding stock at any given time, to the exclusion of others, who acquire stock before the dividend is declared, although subsequent to the date fixed by the board of directors.

A PPEAL from a judgment entered at a special term. The plaintiff owned four of the defendants' bonds, purchased before January 1, 1856, and delivered in this state, for the payment each of \$1000 and interest, in the usual form, but containing also the following special clause: "And the said company also agree, to transfer to the holder hereof at any time before the said principal sum shall fall due, whenever such holder shall elect to receive the same on delivery of this obligation, and of the unpaid coupons or interest warrants, to the treasurer of said company, at Terre Haute, twenty shares of fifty dollars each of the capital stock of said company, in exchange for and in satisfaction of this obligation. And said company further agree, that this obligation and all rights and benefits arising therefrom, may be transferred by general or special indorsement or delivery, as though the same were a note of hand and payable to bearer, hereby waiving all benefit from

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appraisement, valuation or stay-laws." On November 26, 1856, the plaintiff mailed the bonds and interest coupons to the defendant, inclosed in a registered letter, post paid, and properly addressed, with a written demand that the bonds should be converted into stock according to said special clause. The letter reached Terre Haute (the place of address) on November 30, 1856. According to the course of business in the post office, registered letters are not distributed and delivered as ordinary letters are, but are placed by themselves, and the parties to whom they are addressed are required to call or send for them, and give a receipt on taking them from the office. On the 1st or 2d day of December, 1858, the messenger who usually attended to the defendants' post office business, was informed that there was in the post office a registered letter for the defendants, but did not communicate the information, in consequence of the absence from town of Wood, the defendants' secretary, and the letter was not actually delivered to the defendants until December 3d, 1856, they being meanwhile ignorant of its contents. On December 16, 1856, the defendants mailed to the plaintiff (by letter received December 20, 1856) a certificate, in the usual form, dated December 3, 1856, for eighty shares of their stock, in lieu of such bonds, and a check for interest on the bonds to December 1st, 1856, which check was forthwith mailed back and returned by the plaintiff to the defendants. On December 17, 1856, the defendants declared a dividend, by resolution, in the following words: "At a meeting of the board of directors of the Terre Haute and Richmond Rail Road Company, held Wednesday, December 17, 1856, it was ordered that a dividend of seven per cent be declared out of the surplus earnings of the road, ending November 30th, payable January 6th. It was also further ordered that a stock dividend of twenty per cent, payable in stock, and charged to the surplus account, be paid to the holders of stock at the close of the fiscal year, November 30th. Fractional shares to be paid in cash."

A notice of the dividend was published in the public jour-

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nals, dated December 17th, 1856. The plaintiff claimed in the complaint to share in this dividend of December 17, 1856, first, as being entitled to the rights of a stockholder of eighty shares on November 30th, 1856, and secondly, as being a stockholder actually and to all intents before the declaration of the dividend. The defendants, in their answer, averred "that the plaintiff was not a holder or owner of said eighty shares, or any of them, on said 30th of November, nor until some days thereafter, and therefore was not entitled by means of said shares to the said dividend declared on the said 17th day of December, or any part thereof."

The charter of the defendants (§ 24) provided as follows: "Semi-annual dividends of so much of the profits as the corporation may deem expedient, shall be made on the first Mondays of December and July annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience." Prior to 1856 the defendants' fiscal year terminated on December 31st, and the first dividend during the year 1856, was declared by the defendants January 28th, 1856. On the 15th of January, 1856, the defendants passed the following resolution: "At a meeting of the board of directors of the Terre Haute and Richmond Rail Road Company, held January 15, 1856, it is ordered that hereafter the fiscal year terminate on the 30th of November, and that hereafter the dividend be declared on the business of the road for the six months ending May 31st and November 30th." The second dividend during 1856, was declared June 20, 1856, payable July 1st, 1856, and was received, soon after it was declared, by the plaintiff, who was then a stockholder in the company. On the 30th of November, 1856, the defendants' stock and transfer books were closed, and continued so closed for the space of fifteen days thereafter. Notice that said books would be closed was published in the state of Indiana on November 22d, 1856. The defendants, on previous occasions, always closed their books before declaring a dividend. Between January and July,

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1856, the plaintiff was informed by a stockholder in the company, of the above mentioned resolution of January 15, 1856, and on the 1st of November, 1856, was informed by the same stockholder that the books of the company would be closed on November 30. The court below found "that it is a general, but not a universal, custom among companies to close the books before declaring a dividend, and that the extra stock dividend was declared from earnings from business up to November 30th, 1856."

The justice before whom the action was tried found as conclusions of law: *First.* That the arrival of the written demand, and accompanying bonds, in the post office at Terre Haute, on the 30th day of November, and the receipt of the same by the defendants, on the 3d of December, did not, under the circumstances, give the plaintiff, actually or constructively, any right, as stockholder or otherwise, to the dividend afterwards declared on the stock, business and affairs of the defendants, as the same stood and were on the 30th November, the close of the fiscal year, nor any legal claim to damages against the company. *Second.* That the issue of a certificate of stock to the plaintiff, as hereinbefore stated, did not in law give the plaintiff any right to a share of the dividend, declared December 17th, on the business and affairs of the company, as the same stood and were on November 30th, nor a legal claim to damages against the defendants for non-payment. *Third.* That the resolution in regard to said dividend did not in terms, according to its legal construction, give the plaintiff any right to said dividend, or any part thereof or to damages for non-payment of the whole, or any part thereof. *Fourth.* That the defendants should accordingly have judgment on the merits, with costs of action.

Judgment was accordingly entered for the defendants, and the plaintiff appealed.

S. W. & R. B. Roosevelt, for the appellant.

C. P. Kirkland, for the respondents.

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By the Court, INGRAHAM, J. The plaintiff was the holder of four bonds issued by the defendants, a corporation chartered by the state of Indiana, for \$1000 each. These bonds contained a clause by which the defendants agreed to transfer to the holder thereof, at any time before the same fell due, whenever the holder should elect to receive the same, on delivery of such bond and of the unpaid coupons to the treasurer of the company at Terre Haute, an equal amount at par in the shares of the capital stock of said company, in exchange for such bonds. The charter of the company provided that semi-annual dividends of so much of the profits as the directors should deem expedient, should be made on the first Mondays of December and July, unless the directors should fix on a different day, and pay the stockholders as soon thereafter as they could with convenience. On the 26th of November, 1856, the plaintiff mailed his bonds, with the unpaid coupons, to the secretary of the defendants, with a demand inclosed, requesting to have the same converted into capital stock, according to the condition in the bond. Such letter reached the post office in Terre Haute on the 30th November. The defendants did not take the letter from the post office on that day, and it was not actually received by the defendants until the 3d of December. On that day the secretary informed the plaintiff that his bonds were received too late for the stock to be entitled to dividend for the six months ending November 30th. On the 16th December the secretary sent to the plaintiff a certificate of stock, dated 3d December, and a check for interest up to 1st December, being three months, on the bond, on one half of the amount of the coupon first coming due. This check the plaintiff returned.

On the 15th January the directors passed a resolution ordering that the fiscal year thereafter terminate on the 30th November, and that dividends be declared on the business of the board for six months, ending 31st May and 30th November. The stock and transfer books were closed on the 30th of November, and continued closed fifteen days, and were

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opened on the 16th of December. On the 17th of December the defendants declared a dividend, as follows: "Ordered that a dividend of seven per cent be declared, out of the surplus earnings of the road, ending November 30th, payable January 6th. It is also further ordered that a stock dividend of twenty per cent, payable in stock and charged to the surplus account, be paid to the holders of stock at the close of the fiscal year, November 30th. The plaintiff demanded the cash dividend and stock dividend, both of which were refused, and he brought this action to recover the same.

The cause was tried before a justice, without a jury, who found as matter of law, that the issue of stock to the plaintiff did not entitle him to a share of the dividend declared on the 17th December, nor to any damages against the defendants for non-payment, and that the terms of the resolution did not give the plaintiff any right to said dividend or any part thereof, or any damages for non-payment thereof. To these rulings the plaintiff excepted.

It must be conceded that before making the dividend on the 17th of December, the plaintiff had, by the act of the company, been admitted a stockholder, of the date of the 3d December, and even if his rights did not attach until such certificate was actually issued, the issue of it on the 16th December, and placing it that day in the post office, was an issue to him of the stock at that time, and entitled him to all the rights of a stockholder.

Had the corporation declared a dividend while the books were closed, and before the plaintiff was admitted on the books to be a stockholder, by the issue to him of the stock, it might have become necessary to inquire whether the arrival of the plaintiff's letter at Terre Haute, on the 30th November, in the post office, gave him any right to be deemed a stockholder as of that day. The condition of the bond was that the same should be presented to the treasurer at Terre Haute. This condition was not complied with by sending a letter to the secretary, which was not received by him until a subsequent

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date, and gave the plaintiff no right to be deemed a stockholder. If it had been shown that application for letters on that day was purposely avoided, another question might arise on this branch of the case which it is not necessary now to discuss.

Prima facie all stockholders, at any particular period, are equally interested in the property and business of a corporation. They assume the same liabilities, are entitled to the same rights, and are equal owners of the property. When, therefore, the directors undertake to distribute among the stockholders any portion of the funds or property of a corporation—whether it be called profits or not—all the stockholders are entitled to an equal share in the fund, proportionate to their stock; whether they have been stockholders for a longer or shorter period. Unless the charter gives the directors power to discriminate between the stockholders at different periods in the distribution of profits, they are all entitled to share therein. The designation of a fiscal year has nothing to do with the distribution of its proceeds among the stockholders at the close thereof. It may be more properly referred to as the period for making up on the books annual accounts. If it limited the profits to those who held stock at that time, it would alike exclude stockholders who subsequently acquired stock from any surplus remaining after the dividend was declared, as it would from a participation in the dividend then made. But it is not even necessary for the purposes of this appeal to invoke the aid of these principles. By the terms of the resolution itself, the seven per cent dividend in cash was made to the stockholders then holding stock, without any discrimination. This dividend was declared to be a dividend of seven per cent out of the surplus earnings of the road, ending November 30th, payable January 6th. It was not limited, as the stock dividend was, to those who held stock at the close of the fiscal year. It was unlimited. Who were then entitled to it? The stockholders. Who were they? All who held stock when the resolution was passed, on the 17th December.

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The plaintiff was at that time a stockholder, by the voluntary act of the defendants. As such he was entitled to a dividend on his stock, under this resolution, just as much as were the other stockholders. Any other rule would give to the officers of a company a discretionary power as to whom they would pay dividends to. They must pay to the persons holding stock on the books of the company. If the directors, in making the dividend, do not limit the period, the officers have no right to do so, and their only guide is the stock book to ascertain the parties entitled thereto at the date when the dividend is declared. As the plaintiff was a stockholder on the books of the company at the time the dividend was declared, he was entitled to the cash dividend under the resolution as passed by the board of directors on the 17th of December, 1856.

I do not mean to be understood as applying these rules to a case where the dividend is declared before the books are opened. There the officers must be governed by the books as they existed at the time they were closed, and the distribution be made accordingly.

The views above expressed dispose of this appeal, and render a new trial necessary. It is therefore not requisite that we should examine the other question in the case, viz. whether a board of directors, in making a dividend, can limit it to persons holding stock at any given time, to the exclusion of others who subsequently acquire stock. The question is not free from difficulty, and I am inclined to the opinion that the board of directors had no power thus to diminish the value of the stock. But as a new trial must be ordered, we refrain from expressing any further opinion thereon, at the present time.

New trial ordered; costs to abide the event.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Pratt and Ingraham, Justices.*]

MOERS *vs.* MORRO and others.

Appeals from orders denying motions to vacate orders of arrest, where the party is on bail, and cannot therefore be seriously injured by the order of arrest remaining in force, are not to be encouraged.

Upon an appeal in such a case, two adjudications having already been had that a *prima facie* case has been made out for the arrest of the defendants, viz. once on the granting of the order of arrest, and the second time on the motion to vacate it—the facts found by the court below, necessary to sustain the order, will be deemed established; unless the contrary can be clearly shown.

In what cases the acts and declarations of one of several conspirators are admissible in evidence against the others.

THIS was an appeal, by the defendant Martens, from an order made at a special term, denying a motion to vacate an order of arrest. The complaint charged all the defendants with having entered into a conspiracy to defraud the plaintiffs out of a quantity of tobacco. The opinion of the court contains the other facts in the case.

By the Court, DAVIES, J. In this case an order of arrest was granted by one of the justices of this court, by which all of the defendants have been arrested. A motion, on their behalf to discharge the order of arrest, was denied. This motion was founded solely upon the affidavits on the part of the plaintiff, without any denial or counter affidavits on the part of the defendants, or either of them. From this order the defendant Martens alone has appealed.

We do not think appeals from orders of this character are to be encouraged. The order of arrest is a provisional remedy, not affecting the points of the case, and where the party is on bail, he cannot be seriously prejudiced by the order remaining in force until the final termination of the action.

The attention of the court has already twice been called to these facts; once on granting the order, and the second time on the motion to vacate it. Two adjudications have therefore already been had that a *prima facie* case has been made

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out for the arrest of all the defendants, and the facts found by the court below necessary to sustain these adjudications are, on appeal, to be deemed as established, unless the contrary can be clearly pointed out. We are not prepared to say that the learned justice, who heard the motion and granted the order, has found facts not warranted by the evidence before him.

It is charged in the affidavits, and not denied, that a conspiracy to cheat and defraud the plaintiff was formed by all the defendants; that each did certain acts, as part of the general scheme, having that object in view; and the acts and declarations of each defendant in thus aiding and carrying out this general scheme are particularly detailed. The actual conspiracy being charged, and not denied, is to be assumed to be established. Each of the defendants is deemed in law a party to all acts done by any of the other parties in furtherance of the common design. (3 *Greenl. Ev.* § 93.) And the acts and declarations of the other conspirators are admitted as evidence against each, upon the principle that by the act of conspiring together, they have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestæ*, and therefore the act of all. It is the same principle of identity with each other that governs in regard to the acts and admissions of agents, when offered in evidence against their principals, and of partners against the partnership. (3 *Greenl. Ev.* § 94.) In the affidavits before us it is alleged, and not denied, that Martens, at the time he agreed to discount and pay cash for the notes of Morro & Nehmeyer for the tobacco, to be sold to them by the plaintiff, and on the faith of which the plaintiff let them have the tobacco, "well knew that said firm of Morro & Nehmeyer was insolvent, and that judgment had been obtained against them, and that said firm had no credit whatever;" and that at the time said firm of Morro & Nehmeyer

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was indebted to Martens; that he was intimately acquainted with the business and transactions of said firm, and then claimed to own all the property then in the apparent possession of said firm; and that he made the representations stated with the design to cheat and defraud the plaintiff, and with the design to get said tobacco into the possession and under the control of Morro & Nehmeyer, that he might, by means thereof, succeed in realizing the amount due to him from said firm.

With these statements uncontradicted before the justice at special term, we are not surprised that he refused to vacate the order of arrest. We think such refusal to be correct, and the order appealed from is affirmed, with costs.

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 FRENCH AND HEISER vs. THE MAYOR &C. OF NEW YORK.

The covenants in a lease were, that on the last day of the term the lessees would surrender the demised premises, "and all the improvements that may have been placed thereon by the said" lessees, "and which improvements are to belong to" the lessors, "*and all of which* are to be surrendered up in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." *Held* that the parties intended, the one to surrender, and the other to receive and accept, at the termination of the lease, all the improvements which should be placed thereon by the tenants during the lease; and that such improvements embraced all additions, erections or alterations made by the tenants during the term, and such as were used by them in the enjoyment of the lease. And that, on the expiration of the term, the improvements became the property of the lessors, who had a right to retain them.

ON the 28th of March, 1843, the defendants leased to the plaintiffs the premises known as "Castle Garden," for eleven years from May 1st, 1843, at an annual rent of \$2000.

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The lease contained this clause: "And that on the last day of the said term, or other sooner determination of the estate hereby granted, the said parties of the second part, their executors, administrators or assigns, shall and will quit and surrender unto the said parties of the first part, their successors or assigns, the premises hereby demised, and all the improvements that may have been placed thereon by the said parties of the second part, their executors, administrators or assigns, which improvements are to belong to the said parties of the first part, their successors or assigns, and all of which are to be so surrendered up in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." On the 1st of May, 1854, the term of the plaintiffs under the lease expired.

Before the expiration of their term, the plaintiffs began to remove certain articles from the premises. An injunction was obtained by the defendants, April 15, 1854, restraining the plaintiffs from removing or displacing "gas fixtures, benches, glasses and windows, partitions, floors, counters, or the materials derived from tearing down any of the aforesaid fixtures, or from tearing down the stage, or any other improvement in said building." The action was subsequently discontinued.

This action was brought to recover the value of "gas pipes, burners, gas ladders, and two large and one small meters, lumber in hat room, fifteen batten doors, hinges and locks, floor of stage, large glass case, benches in gallery, benches under gallery upholstered, wood work and canvas constituting the stage, gas pendant under gallery, picket fence on the bridge leading to the garden, sheds on the north and south sides of the building, fixtures and ticket office, board fence on the north side of the building, which are alleged to have been converted by the defendants."

A verdict was taken for the plaintiffs for \$4431.25, subject to the opinion of the court.

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Wm. M. Evarts and *R. H. Bowne*, for the plaintiffs.

R. Busteed and *A. R. Lawrence, Jr.*, for the defendants.

By the Court, DAVIES, J. The question in this case is not, what are fixtures which a tenant is at liberty to remove on the expiration of his lease? but, what did the lessees covenant with the lessors they would surrender and suffer to remain on the demised premises on the termination of the lease?

The covenants of the lease are, that on the last day of the term the lessees will surrender the demised premises, "and all the improvements that may have been placed thereon by the said parties of the second part," (the lessees;) "and which improvements are to belong to the said parties of the first part," (the lessors;) "*and all of which* are to be surrendered up in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted."

The terms of the lease are therefore very broad, and would seem to comprehend all and every erection, improvement or addition made, put or erected upon said premises during the continuance of the lease. It was manifestly in contemplation of the parties to the lease, at the time of making it, that extensive improvements, changes or alterations, were to be made by the lessees to adapt the demised premises to such uses and purposes as they might wish to put them to, and that these alterations and improvements were to be made at the expense of the lessees.

The lessors consented to such alterations and improvements, on condition that at the expiration of the lease they were to belong to and become the property of the lessors; and the lessees agreed, in consideration of such permission to make alterations, repairs and improvements, on the expiration of the lease, to surrender them up in as good state and condition as reasonable use and wear thereof would permit.

The covenant is to surrender *all* the improvements that may have been placed thereon. Improvements clearly, as the

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word is here used, embrace every addition, alteration, erection or annexation made by the lessees during the demised term, to render the premises more available and profitable, or useful or convenient to them. It is a more comprehensive word than "fixtures," and necessarily includes it, and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and where the parties say that all improvements which may be placed on the premises shall belong to the lessors, it is difficult to say what, if any thing, would be excluded.

Such, we think, is the view taken by the common pleas of England, in a case not dissimilar to the present. (*West v. Blakeway*, 2 *Manning & Granger*, 727.) In that case the tenant had covenanted to yield up at the expiration of his term all erections and improvements erected, made or set up during the term; and it was held that this covenant was broken by the removal of the sashes and frame-work of a green-house erected during the term, the frame-work of which was laid upon walls built for the purpose of receiving it, and embedded in mortar thereon. The judges thought the parties had intentionally adopted the words, "erections and improvements," for the very purpose of avoiding all discussions as to what might be considered as coming within the description of a fixture. It is very apparent that the court, in that case, did not place their judgment on the assumption that the green-house was a fixture, but on the covenant to surrender all erections and improvements, and that those words were more comprehensive than fixtures.

We think the parties in this case intended, the one to surrender, and the other to receive and accept, at the termination of the lease, all the improvements which should be placed thereon by the tenants during the lease, and that such improvements embraced all additions, erections or alterations made by the tenants during the term, and such as were used by them in the enjoyment of the lease. On its expiration

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the improvements became the property of the lessors, and they had a right to retain them.

It is difficult to see, upon the principles here enunciated, that any of the articles enumerated in the complaint in this action are not embraced in the covenants of the plaintiffs to surrender them. If any of them are not, then the plaintiffs will be entitled to recover for such, and such only.

A new trial must be had ; costs to abide the event.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Davies and Ingraham*, Justices.]

 POPE and others vs. DINSMORE and others.

Where defendants decline to appear upon the trial, and then appeal to the general term, from the judgment rendered against them, without a case or exceptions, the appeal will be dismissed.

Although an objection that the complaint does not state facts sufficient to constitute a cause of action need not necessarily be raised by demurrer, yet the question should, in some form, be raised and passed upon at special term or circuit, before the defendant should be allowed to appeal.

If a defendant, by any accident or misfortune, has been prevented from appearing at the trial, he should move to have his default opened ; or perhaps he might succeed in a motion to set aside the judgment, on the ground that the record does not show a valid recovery. *Per PRATT, J.*

THIS was a motion, on the part of the plaintiffs, to dismiss an appeal brought by the defendants from a judgment entered against them by default.

By the Court, PRATT, J. The defendants in this case declined to appear upon the trial, and have appealed to the general term from the judgment, without a case or exceptions, and a motion now is made, on the part of the plaintiffs, to dismiss the appeal. I am of opinion that the appeal should be dismissed.

It is claimed, on the part of the defendants, that an objection to the sufficiency of the complaint may be taken for the

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first time upon appeal. If that be so, the appeal cannot be dismissed, but if the complaint be sufficient, the judgment should be affirmed. It is true that when the complaint does not state facts sufficient to constitute a cause of action, the objection need not necessarily be made by demurrer. But the question, in my opinion, should in some form be raised and passed upon at special term or circuit, before the party objecting should be allowed to appeal.

Under the code, the appeal to the general term seems to be provided for the review of actual determinations of the court at circuit and special term. By section 268 of the code it is provided, in trials by the court without a jury, that "for the purposes of an appeal, either party may except to a decision on a matter of law arising upon the trial, within ten days after notice in writing of the judgment." It is then, in the same section, provided, when questions of fact or of law upon the evidence are desired to be reviewed by either party, that a case may be made, and the section then contains this restriction: that the questions, whether of fact or of law, shall only be reviewed in the manner prescribed by that section. Now, it was clearly competent for the defendants to take, upon the trial, an objection to the sufficiency of the complaint, and an exception to the ruling of the judge, if adverse to them. But to allow them to reserve an objection of this character, to be made for the first time upon appeal, would be liable, I think, to great abuse, and contravene the manifest intention of the code.

If the defendants, by any accident or misfortune, have been prevented from appearing at the trial, they should move to have their default opened, or perhaps they might succeed in a motion to set aside the judgment, on the ground that the record does not show a valid recovery. But they should, I think, be required to bring the question, in some form, before the court at special term, in order to entitle them to appeal to the general term, from the judgment.

And this question has been substantially passed upon by

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court of appeals in *Hunt v. Bloomer* (3 Kern. 341) and *Johnson v. Whitlock* (*Id.* 344.) Those were cases of motions to dismiss appeals from judgments at general term, on the ground that no exceptions had been taken at the trial, and no case had been made or settled, and the motions were granted by the court. Now, if a party has the right to appeal upon the record alone, where no exception has been taken, and may, upon such appeal, take an objection to the sufficiency of the complaint, it was clearly improper in those cases to dismiss the appeals. The court should have examined the record, and if there was no defect found in the pleadings, have affirmed the judgment. These cases, therefore, may be deemed to overrule the cases in this court, cited upon the argument on behalf of the appellants.

Appeal dismissed, with costs.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Pratt and Ingraham*, Justices.]

In the matter of the RECIPROCITY BANK.

The provisions of the act of April 5, 1849, "to enforce the responsibility of stockholders in certain banking corporations and associations," &c., and those of the constitution, in aid of which that act was passed, apply to banks existing anterior to the constitution and the statute, and render the stockholders in such banks individually liable for the debts of the banks.

The provisions of the constitution and of the act of 1849 are not void, when applied to pre-existing banks, as being in conflict with the tenth section of the first article of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts; where the charter reserves to the legislature the right to alter, modify or repeal the same, at any time.

Where the power to alter a charter is reserved, in express terms, in the act by which it is granted, and such power is subsequently exercised, by an authority adequate for that purpose, and in accordance with the forms prescribed by the constitution in force when the alteration is made, the law is not obnoxious to the objection that it violates the contract with the corporation contained in its charter.

An act of the legislature, altering the charter of a bank incorporated previous

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to the adoption of the constitution of 1846, is valid, if passed according to the provisions of that constitution. Hence a two-thirds vote in favor of it is not necessary.

The court has power, under the act of April 5, 1849, to order an apportionment of the debts of a corporation among the stockholders, notwithstanding there is a large amount of assets in the receiver's hands not disposed of.

Married women could own stock in banks, in their own right, both at common law, and under the act of 1848 and the acts amending it; and the legislature had the power to alter the common law, so as to make them personally liable, to the amount of their stock. It has been thought proper to do so, and the court is bound to enforce the liability.

THIS was a motion to confirm the report of a referee, to whom it was referred to apportion the debts and liabilities of the Reciprocity Bank among the several stockholders liable for the same, under the act of April 5, 1849, "to enforce the responsibility of stockholders in certain banking corporations and associations," &c. (*Laws of 1849, p. 340.*) The bank was incorporated in 1834, by the name of the Sacket's Harbor Bank. In 1852 it was authorized to change its place of business from Sacket's Harbor to Buffalo; and by an act of the legislature, passed March 6, 1857, its name was changed to that of the "Reciprocity Bank."

H. W. Rogers, for Wm. Williams, receiver, &c., in favor of the application.

John Ganson, for the Northwestern Insurance Company, Elijah P. Williams and William G. Fargo.

Ward Hunt, for John Savage.

J. L. Curtenius, for S. Newton Dexter and others.

H. C. Van Vorst, for James R. Boyd and others.

F. Kernan, for H. P. Alexander and others.

Robert Lansing, for himself and others.

John Clark, for Erastus Rogers and others.

Augustus Ford, for himself and others, opposed the confirmation.

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GREENE, J. After a careful consideration of the questions raised on the argument, I have come to the conclusion that the report of the referee should be confirmed. It would be alike impracticable and unprofitable to refer in this opinion, at length, to the various minor questions raised by the different exceptors. Many of them relate to the practice under the act in question, and I will merely remark that such of them as were not considered and decided by the court of appeals "In the matter of the Empire City Bank," I have had frequent occasion to examine, with care, in the progress of this proceeding, which has been conducted, I believe, entirely before me, and upon a reconsideration of my previous conclusions, I am convinced that the proceedings have, in all respects, been conducted in substantial compliance with this act. I will, therefore, proceed to the examination of the objections in which all the exceptors unite on the argument, and which question directly the validity of any proceedings, in any form, under the statute, against this bank.

First, then, it is claimed that neither the provisions of the act of 1849, nor those of the constitution in aid of which that act was passed, extend, either in terms or by fair implication, to the Reciprocity Bank, for the reason that it was created and existed anterior to the constitution and the statute, and that both, if not so declared in terms, are by plain implication prospective in their character, and must be so limited in their operation. The safest, and indeed the only test of the soundness of this position, will be found by resorting to the primary, and, in the absence of any ambiguity or obscurity appearing there, the *exclusive* evidence as to the intention of the people in adopting the constitution, and of the legislature in passing the statute, namely, *the language of those instruments*. I think both the constitution and the statute apply in plain terms to this corporation. The language of the seventh section of the eighth article of the constitution is, "the stockholders of *every* corporation. &c., for banking purposes, issuing bank notes, &c., to circulate as money after the 1st

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day of January, 1850, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation, &c., for all its debts and liabilities of every kind contracted after the 1st day of January, 1850." I do not see how the convention could have adopted language plainer or more comprehensive and apt than this, to express an intention to include *all corporations*, without regard to the date or purpose of their incorporation. The language of the statute seems to me equally clear. It is, (§ 1,) "Whenever default shall be made in the payment of any debt or liability contracted after the 1st day of January, 1850, by *any corporation* or joint stock association, &c., the stockholders of such corporation or association shall be individually responsible," &c. This language seems to me to admit of but one interpretation. It expresses but one meaning, and neither needs nor admits of construction; and here, as is my strong inclination and general practice in such cases, I should rest the case and arrest argument. But the earnestness and distinguished ability with which the position in question was urged upon me on the argument, not only command my respect, but seem to excuse, if they do not require, some discussion of the proposition, on general principles. And in the first place, the inquiry appears to be natural and significant, why, if it was the intention of the framers of the constitution to exempt stockholders, in existing corporations of this description, from the contemplated liability, did they fix upon a period of three years after the constitution was designed to take effect, as the time when this provision should go into operation? If it was intended to apply to corporations to be created in future, those who desired to become stockholders in such corporations, would do so with a full knowledge of the liabilities which they would incur by so doing; and no postponement of the time when this provision should take effect would be necessary for their protection, or consistent with the general policy indicated by this section. It is apparent, on the contrary, that the framers of the constitution

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intended to establish a general rule of personal liability on the part of stockholders, applicable to all corporations of this sort, and to postpone its operation to such a time as would enable all interested in their stock and business to shape their affairs with a view to the known responsibilities which would be incident to their future operations. This, among many other considerations which might be urged, is, to my mind, very significant as to the intention of the framers of the constitution; and if it was possible to add anything to the force of the very clear and simple language in which that intention is expressed, we have ample assurance, from this view of the case, that that language was deliberately chosen and well considered, with the intent to express precisely what it so plainly imports. The absence, also, of any word in the section to limit or qualify the very general terms used, when the two words, "hereafter created," inserted after the word "purposes," in the second line, would have done it so effectually, and would, moreover, have occurred so naturally to an intelligent draughtsman, having such an intention, seems to exclude the idea of any such limited application of the language of the section as is now contended for. But this is not all the extrinsic evidence we have on this subject. It appears from the reported proceedings of the convention, (*Atlas ed.* 997 and 998,) that the precise amendment just suggested was proposed in the convention when this section was under discussion, and was rejected after debate and consideration. I cannot well see how we could get an accumulation of evidence more varied and pertinent in its character, or conclusive in its force, than is derived from all these sources. It tends uniformly to one conclusion, and that I have already suggested.

But it is claimed by the several exceptors, that if the constitution and statute are applicable in terms to this corporation, their provisions are void, for the reason that they are in conflict with that provision of the tenth section of the first article of the constitution of the United States, which declares that no state shall pass any "law impairing the obligation of

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contracts." The charter of this corporation was granted by the legislature of this state in 1834. (*Sess. Laws, ch. 204, p. 355.*) It contains no provisions subjecting the stockholders to any personal liability whatever; but the 37th section is in these words: "The legislature may, at any time, alter, modify, or repeal this act, or any of its provisions." That this charter was a contract between the state and the corporators, there can be no doubt. The question is, whether the act of 1849, which added to the terms or "obligations" of the original contract the personal liability of the corporators for the debts of the corporation, essentially changed, or, in the language of the constitutional prohibition which we are considering, "impairs the obligation" of that contract. The exceptors cite and rely upon the cases of *The Piqua Branch of State Bank of Ohio v. Knoop*, (16 How. U. S. Rep. 369,) and *Dodge v. Woolsey*, (18 *id.* 331,) as authorities on this point. A short statement of those cases will be sufficient to show their bearing upon the question under consideration. By a law passed by the general assembly of Ohio, in 1845, it was provided that all banks organized under that act, and accepting its provisions, should, semi-annually, set off and pay to the state a certain per cent on its profits for the last half year; which sum was to be accepted by the state in "lieu of all taxes to which the company or the stockholders therein would otherwise be subject." Several banks organized under this act, and among these the Piqua Bank, or branch, and another, in which the plaintiff in the case last cited was a foreign stockholder. Subsequently, and in 1851, the general assembly passed an act taxing all banks, the same as individuals, thereby imposing upon the banks in question a higher tax than they were subject to by the law of 1845. The question raised in the first case was, as to the validity of the act of 1851. The only difference between the cases was, that in the last case the law of the legislature was passed in 1852, under and in pursuance of a constitution different from that under which the law of 1845 was passed. The new con-

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stitution required the legislature to pass uniform laws on the subject of taxation, and to tax banks the same as other parties. The supreme court of the United States held that both laws were in conflict with the provision of the constitution above cited. That the law of 1845 was a contract between the state and such banks as organized under it, and that the prohibition of any law impairing it, was a limitation of the sovereign power of the state, which extended as well to the people in their original sovereign capacity, as to their legislative, executive and judicial agents. In a word, that the restraint is imposed upon the *government* of the state, and not upon any particular branch or department of the government. The soundness of this proposition, and its applicability to the cases cited, are too obvious to require argument. The result of that application is equally obvious. A state constitution is no more nor less than a law, differing from a law passed by the legislature only in the mode of its enactment, and if in either way a state attempts to violate or evade any provision of the constitution of the United States, the law which would produce that result is void. But the cases cited are not in point. The distinguishing fact in this case, and one which I think decisive of the point under consideration, is the reservation of the power by the legislature, in the 37th section of the charter of the Reciprocity Bank, already cited, to alter, modify or repeal the charter, *or any of its provisions, at any time*. The language of this section, it will be conceded, reserves to the state plenary power over this charter. It will be seen, on a careful examination of the Ohio cases, that no such power was reserved by the legislature in the act of 1845, and that that fact controlled the decision of those cases. No mention is made in those cases of any such reservation in the act, which is fully set out in the bill filed in the case of *Dodge v. Woolsey*; and it appears affirmatively from the opinion of Mr. Justice McLean, in the case of *The Piqua Bank v. Knoop*, that that power was not reserved in the act. He says: "Every valuable privilege given by the charter, and which conduced to an ac-

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ceptance of it, and an organization under it, is a contract which cannot be changed by the legislature, *when the power to do so is not reserved by the charter*," thus recognizing both the validity of such a reservation and its controlling importance upon such a question.

Indeed, the right of the legislature to alter a charter previously granted, to the extent to which it has reserved the power to do so, was never questioned. But it was urged, and I confess with much plausibility, by the learned and venerable counsel who made the principal argument upon this question, that, as by the provisions of the constitution of this state, adopted in 1822, under which this charter was granted, (*art. 7, § 11.*) "the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill, &c., &c., creating, continuing, altering or renewing any body politic or corporate;" and as this law of 1849 has the effect to alter the charter of this corporation, and it had not the assent of two-thirds of the legislature to its passage, the law is void.

The latter fact is undisputed, and it must be conceded that this act does in effect alter the charter; but in connection with these facts, it must be remembered that by the constitution of 1846, which was in force when the act in question was passed, the assent of two-thirds of the members of the legislature to the passage of such a bill was not required, and that this act had the assent of the requisite number of votes, according to the existing constitution. The question that is presented by this phase of the case is simply this: When the power to alter a corporate charter is reserved by the legislature granting it, is the number of votes required for such alteration by the constitution in force when that charter is granted, requisite to the validity of an act altering it, without regard to the time when, or circumstances under which, such alteration is made? The argument of the exceptors is, that the assent of two-thirds of the members of the legislature to the alteration of this charter, which was required when it was granted,

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is as much a part of the charter or condition of the contract between the states and the corporation, as the rights reserved in general terms to alter the charter.

I have bestowed much reflection upon this view of the case, but I cannot assent to it. The error of the argument consists, in my judgment, in confounding the idea of a general power with the agency through which, and the form and manner in which, the power is exercised. The legislature is simply the representative and organ of the sovereignty of the state. The term is only another name for the same thing. The state, then, acting through this organ of the sovereignty, reserved to *itself* this acknowledged and essential attribute of its original power—the right, at any time, to repeal or alter this charter, or any of its provisions. I cannot think that the existence of this power depends, in any degree, upon the mere form or manner in which it may be exercised. On the contrary, I think the people, who possess the power, may, from time to time, designate the agents or organs by which, and prescribe the manner in which, the power shall be exercised. This they have heretofore done by written constitutions, in which they have imposed specific restrictions upon their legislature, and to some extent prescribed to it forms and modes of proceeding. The powers of the legislature must, of course, be exercised in subordination to such restrictions, and in conformity to the prescribed forms of procedure. But, subject to these qualifications, the legislature, in my opinion, may exercise any power vested in it at its pleasure. In the exercise of such power, it is vested with a plenary discretion over all questions of expediency, time and forms of proceeding. If this were not so, a radical, or even material change, by the people, in the policy or form of their government, by their organic law, would result in an unintentional surrender by them of many, and some of the most essential, powers of sovereignty. If, for instance, the people should, in a subsequent revision of their constitution, vest the legislative power of the state in one general assembly instead of a senate and assembly, by which that

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power is now exercised, it would no longer be possible to exercise the power reserved by the legislature in this charter, and all of the charters granted for the last thirty years. As there would no longer be *two branches* of the legislature, the assent of two thirds of the members of "each branch" could not be obtained. Can it be seriously claimed that by such a change in the form of the state government this power, so cautiously reserved by the legislature, would be abandoned, and that thenceforward the innumerable corporations created by the legislature since 1822, would be absolved from all further legislative control and responsibility to its superintending power? The statement of such a proposition seems to me a sufficient refutation of it. Upon this theory it might be argued (and I am not prepared to say that the argument would not be sound) that, by the changes made by the constitution of 1846, this and many other essential powers of the legislature had been surrendered. The change in the manner of choosing senators and members of assembly may be cited as an instance. Why might not the stockholders in these corporations argue, with equal force, that the condition that the legislature should be chosen as it was at the time the charter was granted, was as much a part of the contract as that a certain number of votes should be obtained for the alteration of the charter?

But I deem it unnecessary to pursue the argument. My conclusion in brief is, that as the power to make this alteration was reserved in express terms in this charter, and as it was exercised by an authority adequate for that purpose, and in accordance with the forms prescribed by the constitution in force when the alteration was made, the law is not obnoxious to the objection that it violates the contract with this corporation contained in its charter.

I think enough has been said to show that the act is not in conflict with the 18th section of the first article of our constitution. That section, in general terms, provides that nothing in that constitution shall affect any corporate charters granted by this state since the 14th day of October, 1775, meaning

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simply, as I read it, that all corporate rights then in existence should remain in *statu quo*; that the corporate franchise should continue to be enjoyed upon the same terms, and held subject to the same conditions, that were then attached to them. As we have seen, one of the conditions of this charter was that the legislature (or the state) might at any time alter or repeal it. This was the status of the franchise when the constitution was adopted, and the provision in question, preserving it as it then *was*, did not deprive the state of the right to exercise the power reserved in the charter; and the fact, that the alteration was made by the same instrument which in this section preserved the charter subject to the right to make that alteration, is not at all inconsistent with the provisions of this section.

The next objection to the confirmation of the referee's report, relied upon by all the exceptors, is that the report shows a large amount of assets in the receiver's hands not disposed of, and that, until the assets are exhausted, the court has no power, under the act, to order an apportionment of the debts of the corporation, among the stockholders. As I have before remarked, this question was carefully considered by me, when the order of reference was granted; and after an attentive reconsideration of it, aided by the able arguments of counsel, and a re-examination of the statute, I am unable to come to a different conclusion from that which I reached when I granted the order. I will refer but briefly to a few of the provisions of the statute upon which I found my opinion. Section 12 provides that the receiver, under the direction of the comptroller, shall convert all the securities deposited by the corporation with him, "with the least possible delay," and shall also convert into cash the effects and demands of the corporation, and for that purpose may sell any of such demands at auction, which any justice of this court may authorize to be sold. It further provides, that within ninety days from the time of his appointment, unless such time be extended by a justice of this court, not exceeding ninety days, the receiver

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shall make a dividend of the cash in his hands, among the creditors. Section 13 prescribes the order of distribution. Section 14 provides that if any debts, contracted after the 1st day of January, 1850, remain unpaid, the receiver shall, within thirty days after the declaration of the said first dividend, render an account to a justice of this court, of the debts remaining unpaid, and a preliminary account of his proceedings, stating the cash on hand, the payments made by him, and the dividends declared, &c. Section 15 requires him, *at the same time*, to submit to said justice a list of all persons who have been stockholders since the first day of January, 1850, together with the residence and the amount of stock held by each. Section 16 provides that said justice shall, *thereupon*, refer the report and list of stockholders to a referee, with directions, after giving certain notices, to apportion the debts of the corporation, incurred after the said first day of January, among the stockholders. Sections 17, 18 and 19 contain directions as to the proceedings and report of the referee. Sections 19 and 20 provide for the filing of the report of the referee, and the entry of the order of confirmation, and the effect of such order. Section 23 provides that neither the dividends directed in the preceding sections to be made, *nor the apportionment of the debts* of the corporation, shall be *delayed or suspended* by reason of the pendency of any litigation, &c. &c. for the recovery of any demand *by or against* such corporation, unless the same shall be expressly directed by a justice of this court, &c., and that such delay shall in no case exceed one year. The latter clause of the section provides that if any prosecution shall be pending against such corporation, in which any demand against it may be established, the receiver may retain in his hands the proportion of the funds which belong to such demand, &c., to be applied according to the event of such prosecution, or to be distributed in some future dividend, to creditors or stockholders. The 24th section provides that if, after paying and discharging the debts, &c. there shall remain in the hands of the receiver any assets of the corporation,

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they shall be converted into cash and paid to the stockholders, upon whom the debts have been apportioned, according to the sums paid by them. From these several provisions it appears to me clear, that while the receiver is *peremptorily required*, within the time mentioned in the 12th section as enlarged by a justice of this court, to declare a dividend; and if after such dividend any debts of the corporation contracted after the 1st day of January, 1850, shall remain unpaid, to present his report to such justice containing a list of the persons who, since that time, were stockholders, &c., and that upon receiving such report such justice is as *peremptorily required* to refer the report to a referee, for the purpose of apportioning the debts, &c. of the corporation among the stockholders; the justice before whom the proceedings are pending is vested with an unlimited discretion as to the question whether the effects and *demands* of the corporation shall be first converted into money. The 12th section, it is true, requires the receiver to convert the effects and demands into money, but no time is specified within which this is to be done, and when for that purpose a sale of the “demands” may be thought best, authority to do so must first be obtained from a justice of this court. This authority may be given or withheld, in the discretion of the justice; and it is easy to see that there may be cases where it may be exceedingly indiscreet to give the receiver that authority. But whether given or withheld, the requirement that the receiver shall declare his dividend and make his report, and that *thereupon* the justice to whom the report is presented shall make an order of reference to apportion the debts among the stockholders, is equally *peremptory*. The question as to whether the power to direct a sale of the demands, &c. in this case has been discreetly exercised, is not presented on this motion, and I shall not remark upon it. The only question before me is that of the *power* at this time to make the apportionment. In my opinion the power exists, and to direct it seems to me to be in harmony with the manifest policy of the act. If delay and uncertainty are to attend

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the winding up of the affairs of these institutions, the act evidently contemplates that the resulting hardships should be borne by the stockholders rather than the creditors.

A question was made upon the argument by certain of the exceptors, as to the power of the corporation to receive its stock in payment of debts or otherwise, and to re-issue it. If this was a question between the corporation and such stockholders, it might present serious difficulties. But we are now dealing with a statute liability of the stockholders, real or apparent, to the creditors of the corporation, and I think the statute settles the question. Section two provides in express terms that the term "stockholders" shall apply not only to such persons as appear by the *books* of the corporation, &c. to be such, but also to every equitable owner of the stock. It is not necessary now to inquire whether both such apparent and equitable owners could not be made jointly liable in this proceeding, or how that liability could be enforced. It is enough that those who purchased the Merrick stock consented to do so, and were registered on the books of the bank as stockholders, and received dividends as such. This, in my opinion, makes them liable under this act. I think there is no force in the objection that certain shares of the stock were not assessed by the referee, since it distinctly appears, from his report, that those assessed are assessed for the precise amount that they would have been had the other shares been assessed. Under such circumstances, I can see no rational ground of complaint on their part. The answer to the various objections of the married women who were stockholders at the time of the failure of the bank, is to be found in the plain terms of the act. The liability thereby created is imposed upon the "stockholders." Married women could own stock in banks in their own right, both at common law and under the act of 1848, and the acts amending it, and the legislature had the power to alter the common law so as to make them personally liable to the amount of their stock. It has thought proper to do so, and we are bound, in this as in all other cases,

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to enforce the liability. It is hardly necessary to remark that, as that is a statute liability, it extends to the *feme covert*, and affects her property alone. What it may be worth to creditors, or by what particular proceeding it is to be enforced in this case, are questions with which I have nothing to do.

I think the report of the referee should be confirmed, and an order accordingly must be entered in the office of the clerk of Erie county.

[ERIE SPECIAL TERM, April 4, 1859. *Greene*, Justice.]

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THE WESTERN BANK *vs.* SHERWOOD.

In an action upon a penal bond, the judgment, in form, is for the penalty. The code has not changed the law in this respect.

If there is a condition to the bond, and the cause of action arises from its breach, the plaintiff should state that fact, as one of the facts constituting his cause of action. But this will not affect his right to a judgment in form for the penalty.

Where, by the agreement of the parties, the whole penalty has become due, by the non-payment of an installment of interest, the law will not permit the obligee to collect it, if, on looking at the condition, it is found to be inequitable; and the obligor's rights will be protected, by controlling the execution, according to the law and practice prior to the code.

A defendant may now avail himself of any *defense*, legal or equitable, which he may have to the claim or demand sued on, though the action be prosecuted by an assignee. An assignee still takes and prosecutes the demand subject to all the equities existing between the parties to the contract.

In an action upon a bond conditioned for the payment of money, brought by an assignee, the obligor alleged in his answer that the bond, and a mortgage to secure its payment, were executed by him to one J., in consideration that J. would fulfill and perform certain covenants contained in an agreement between the parties, and that J. had failed and refused to perform his said covenants; *Held* that the matter thus set up constituted a good defense, and that the referee erred in deciding that the same could not be set up against the assignee of the bond, and in excluding the evidence.

A PPEAL from a judgment entered upon the report of a referee. The material facts appear in the opinion.

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Marshall & Harvey, for the plaintiff.

Greene & Stevens, for the defendant.

By the Court, MARVIN, J. The action is upon a bond, assigned by Johnson, the obligee, to the plaintiff. It is in the penalty of \$14,000, conditioned to pay \$7000 at the end of ten years, with interest to be paid annually. An installment of interest was due when the action was commenced. The plaintiff demanded judgment for the \$14,000. The defendant put in issue the assignment of the bond to the plaintiff, and then alleged that the bond, and a mortgage to secure its payment, were executed to Hiram Johnson, in consideration that Johnson would fulfill and perform certain covenants contained in an agreement between the parties. The agreement is set out in the answer. By it Sherwood, upon certain conditions, sells and assigns to Johnson all his interest &c. in the assets in the office known as the exchange office of Hiram Johnson, and he agrees to do certain other things, among them to execute a bond (the one in suit) and a mortgage. Johnson on his part agreed to pay, or cause Sherwood to be released from, all demands against the exchange office, and to cause the mortgages and other securities given by Sherwood to be given up to him to be canceled, within a reasonable time. He also agreed to pay to the Farmers' Joint Stock Banking Company whatever sum he or the said office might owe the said banking company, &c., and to discharge Sherwood from any claim whatever, except &c., on Sherwood's performing the agreement on his part. It is averred that Johnson or the exchange office owed the said banking company a large sum, to wit, \$35,000, and that it was the object of the agreement to provide for the payment of this debt. That Johnson has failed and refused to perform his part of the agreement, has not paid, &c., to the damage of the defendant Sherwood of \$35,000.

On the trial the bond and assignment were read in evidence. It is declared in the assignment that it is made as collateral

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security for the debts and liabilities Johnson owed or was under to the plaintiff, and to secure future debts, and when they are paid and discharged the assignment to be void. The defendant's counsel moved for a nonsuit, on the ground that the action was for the penalty of the bond, and that it was not due to the plaintiff. The referee decided that the plaintiff could recover the interest that had matured; exception. The defendant's counsel insisted that there could be no recovery without Johnson as a party. The referee decided otherwise, and the defendant excepted. The counsel for the defendant insisted that the claims set up by the answer were admitted, there being no reply. The referee decided that the claims against Johnson could not be set up in this action, against the plaintiff; exception. And also that what the answer set up was a defense, and not a counter-claim; exception. The defendant's counsel then offered to prove the facts stated affirmatively in the answer, and the damages sustained by the defendant, by reason of the breach of covenant by Johnson. The referee decided that such facts could not be set up in this action against the plaintiff, and the defendant excepted. The referee found what sum was due for interest, and decided as matter of law that the plaintiff was entitled to judgment for the penal sum of \$14,000, mentioned in the bond, and the costs of the action. Judgment according to the decision.

The defendant's counsel insists that the action can only be brought and maintained for each installment as it becomes due, either of principal or interest, and he refers to sections 142, 129 and 162 of the code.

In my opinion the code has not changed the law in that respect. The action in this court is for the penalty, and the judgment, in form, is for the penalty. If the action is upon a bond, for the breach of any condition other than for the payment of money, specific breaches must now, as formerly, be assigned. The revised statutes are, in this respect, in force. (2 R. S. 378.) The present case is not one of those in which, by the revised statutes, it was required to assign specific

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breaches ; (17 *Wend.* 331 ; 3 *id.* 554 ; 5 *Hill*, 38 ;) and yet I am inclined to think that now breaches should be assigned in all cases, and that this is so, from the system of the code, which requires a plain and concise statement of facts constituting a cause of action, (§ 142 ;) and abolishes all the forms of pleading heretofore existing. No cause of action exists unless there has been a breach of the condition of the bond, and the practice of craving oyer of the bond does not now, probably, exist. If there is a condition to the bond, and the cause of action arise from its breach, I think the plaintiff should state the fact as one of the facts constituting his cause of action. This will not affect the plaintiff's right to a judgment in form for the penalty.

By the agreement of the parties the whole penalty has become due. The law however will not permit the party to collect it, if, on looking at the condition, it is found to be inequitable, and the defendant's rights will be protected by controlling the execution, according to the law and practice prior to the code. In the present case the breach of the bond is sufficiently alleged in the complaint.

If the defendant's counsel is right, it would be necessary to commence a new action whenever an installment of interest should become due after a previous action. I think the code has not effected such a change.

By section 150 of the code it is declared, that "The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action." According to *Gleason v. Moen*, (2 *Duer*, 639 ;) *Spencer v. Babcock*, (22 *Barb.* 326 ;) and *Weeks v. Pryor*, (27 *id.* 79,) the new matter stated in the defendant's answer did not constitute a *counter-claim*. These cases hold that the claim must be one *existing* against a *plaintiff*, so that, as I understand, a judgment might be had against such plaintiff for the amount of the counter-claim, or any portion of it exceeding the amount that should be allowed to the plaintiff, upon his claim. I am

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not disposed to question the soundness of this construction, as a defendant will be permitted, in all cases, to avail himself of any matter by way of *defense*, which would have been available to him prior to the code. An assignee, now as then, will take all claims subject to the equities between the parties to the contract. Promissory notes and bills of exchange transferred in good faith before maturity, will not be subject to such equity. Though the action must never be brought by the real party in interest, which includes an assignee, section 112 of the code saves the rights of a defendant to avail himself of any "set-off or other defense existing at the time of or before notice of the assignment."

I suppose a defendant may now avail himself of any *defense*, legal or equitable, which he may have to the claim or demand made against him, though the action be prosecuted by an assignee. He still takes and prosecutes the demand subject to all the equities existing between the parties to the contract. (*See Gleason v. Moen, supra.*) If *Spencer v. Babcock* goes further, in excluding the defense, I should doubt its soundness. If the law is not, as I suppose, consequences the most serious might follow. A. owes B., upon a bond, \$1000, and B. owes A. upon an account, the like or a less sum; B. is insolvent and assigns the bond, and the assignee brings the action upon it; if A. cannot use, by way of *defense*, his set-off against B., he will have to pay the amount of the bond and lose his account or demand against B. In the case under consideration the new matter set forth in the answer, if proved, would have constituted a defense to the action upon the bond, and the referee erred in deciding that such facts could not be set up in this cause *against the plaintiff*, and in excluding the evidence.

The defendant also objected that the plaintiff could not recover in the absence of Johnson as a party. The pleadings disclose nothing showing Johnson to be a necessary party, unless the facts stated in the answer show it. The plaintiff simply alleges the assignment of the bond to it. When the assignment was produced, upon the trial, it appeared that it

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was made as collateral security for any and all debts and liabilities Johnson owed or was under to the plaintiff, and to cover future debts. When the debts were paid and the liabilities discharged, the assignment was to be void. This, and the facts stated in the answer, show that Johnson would have been a proper party. (*See Code*, §§ 117, 118, 122.) By the latter section the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. In the present case, if the defense is established, the court can dismiss the complaint; but such judgment would not determine the controversy between the defendant and Johnson, the plaintiff's assignor, nor would it affect the state of the account between the plaintiff and Johnson. I certainly doubt whether this is not a case in which, if the defendant proves his defense as alleged in the answer, it will not be necessary to stop and bring Johnson in as a party. But it is not now necessary to pass upon this question. The judgment must be reversed, and there must be a new trial, costs to abide the event.

[ERIE GENERAL TERM, May 16, 1859. *Greene, Marvin and Davis, Justices.*]

 VAN BUREN vs. LOPER.

A buggy wagon, used in his professional business by a practicing physician, who is a householder, and has a family for which he provides, is exempt from levy and sale, by virtue of an execution issued upon a judgment recovered for the purchase money.

MOTION for a new trial, on exceptions first heard at a general term. The action was for the value of a horse converted by the defendant. The plaintiff purchased of one

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Garret a buggy wagon, for the price of which he gave his promissory note. The defendant purchased the note, and obtained a judgment upon it, and took the horse by virtue of an execution issued upon the judgment; and this was the conversion complained of. The plaintiff was a householder, and had a family, for which he provided. He was a practicing physician, and used the horse and buggy wagon in his professional business. The value of the personal property of the plaintiff did not exceed \$150. The court directed a verdict for the defendant, and the plaintiff's counsel excepted.

A. Sawin, for the plaintiff.

Hopkins & Halbert, for the defendant.

By the Court, MARVIN, J. The question is, was the buggy wagon exempt from levy and sale by virtue of the execution? It was the horse that was taken and converted by the defendant; but as the execution was issued upon a judgment recovered on a note given as the consideration for the buggy wagon purchased by the plaintiff, the horse, as a team, was not exempt, provided the buggy wagon was exempt. (*Laws of 1842, ch. 157.*)

This act exempts necessary household furniture and *working tools and team* owned, &c., the value not to exceed \$150. There have been several decisions upon this statute, but no more than two or three that can be said to be in point. In *Quackenbush v. Danks*, (1 *Denio*, 128; *S. C.* 1 *Comst.* 129,) it was *assumed* that a horse and harness used by the owner with another horse not his, were exempt. In *Morse v. Keyes*, (6 *How. Prac. Rep.* 18,) it was held, at general term, Justice Cady delivering the opinion, that a one horse lumber wagon, owned by one who was a mason by trade, and who was a householder, and provided for a family, &c., was not exempt. It was held that "working tools and team" did not include a one horse lumber wagon. This case was decided in 1851. In

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Eastman v. Caswell, (8 How. Prac. Rep. 75,) the question was, whether a one horse gig wagon, owned by a practicing physician, and used in his country practice, was exempt, *he* being within the statute. The justice held it exempt. The county court reversed the judgment, and the supreme court affirmed the judgment of the county court; upon the ground, however, that the justice had erred in other respects. Pratt, J., who gave the opinion of the court, said he had no doubt that within the liberal construction which had always been given to the exemption statutes, the wagon in question was exempt from levy and sale on execution. The case shows that the attention of the court was called to *Morse v. Keyes*, (*supra*,) though the judge does not, in his opinion, refer to it.

In *Wheeler v. Cropsey*, (5 How. Prac. Rep. 288,) it was held at general term, Parker, J., giving the opinion of the court, that the horse of a country physician, whose patients reside at too great a distance to be visited on foot, is a "necessary team," and as such exempt from execution, under the act of 1842.

In *Harthouse v. Rikers*, (1 Duer, 606,) it was held that a carman's "horse, harness and cart" were exempt, the carman being within the statute; that is, being a householder, &c., &c. That they all came within the definition of the term *team*. The opinion was given by Bosworth, J., after consulting all the other judges of the court. It is very well reasoned, and I do not see why the reasoning is not applicable to the present case. The carman used the horse, harness and cart as a means of supporting his family. They constituted his team. In the present case, the plaintiff purchased the buggy wagon, to be used by him in his "medical profession," and it was so used. Suppose a country physician is unable to travel on foot, or ride on horseback, but can visit his patients in a buggy or wagon, will not the horse, harness and buggy, or wagon, be regarded as much his team as in the case of the carman, or the horse of the country physician, who can visit his patients by means of the horse only?

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I think the weight of authority is in favor of the position in this case that the buggy wagon was exempt from levy and sale on execution. A new trial should be denied, with costs, and the defendant should have judgment upon the verdict.

[ERIE GENERAL TERM, May 16, 1859. *Greene, Marvin and Davis*, Justices.]

HESS vs. THE BUFFALO AND NIAGARA FALLS RAIL ROAD COMPANY, and THE NEW YORK CENTRAL RAIL ROAD COMPANY.

Where a complaint against two defendants alleged that one of the defendants erected a building across an alley belonging to the plaintiff and thus obstructed his right of way; and that such defendant then transferred and conveyed the possession of the building to the other defendant, who kept, continued and maintained such obstruction; and the plaintiff prayed judgment for damages, against both defendants; *Held* that the complaint stated facts sufficient to show a cause of action against each defendant separately, but not a cause of action against them jointly; and that such causes of action could not, therefore, be united, in the same complaint.

Held also, that the objection, of such misjoinder, might be taken by a joint demurrer.

It seems that, in such a case, the defendants may move that the plaintiff elect which of the causes of action he will prosecute.

APPEAL from an order overruling a demurrer to the complaint. It is alleged in the complaint that the plaintiff is and was &c. the owner in fee simple, and was &c. and is in the possession of a certain piece or parcel of land, a garden and messuage, situate &c., and all the appurtenances, hereditaments, easements and privileges thereto belonging or in any wise appertaining. That there is a dwelling house on the land, owned and occupied by the plaintiff. That among the appurtenances, easements and privileges belonging to said premises, and owned by the plaintiff as aforesaid, is a private way over and through an alley, or way, being a foot and carriage way, &c. &c.; and that the plaintiff, by reason of his

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owning and occupying said premises, owned and was possessed of said alley or private way, and used the same, and still, of right, ought to have and use the same, &c. That the said defendant (meaning, probably, the Buffalo and Niagara Falls Rail Road Company,) in the year 1852 wrongfully &c. placed, erected and built, in and upon and across said alley or private way, a large stone building, used and occupied by the defendants as a depot, &c., and has continued said building, &c., and the alley has been obstructed, &c. That the plaintiff, by reason of the wrongs, has sustained loss and damage to the amount of \$500. It is then alleged that the other defendant (the New York Central Rail Road Company) is a corporation, and that about the month of July, 1853, the Buffalo and Niagara Falls Rail Road Company transferred and conveyed the possession of the above described buildings and obstructions to the other defendants, to wit, the New York Central Rail Road Company, and that such defendant has from that time been, and now is, in possession of said buildings and obstructions, and has wrongfully kept, &c., and still keeps, &c., said obstructions, &c.; whereby the plaintiff is deprived of the possession and enjoyment of the way, and has sustained loss and damage to the amount of \$500. He demands judgment against the defendants for the sum of \$500 damages, and that the obstructions be removed.

The defendants joined in a demurrer, assigning as grounds, 1. That the complaint did not state facts sufficient to constitute a cause of action. 2. That two causes of action were improperly united in the complaint. 3. That the defendants ought not to have been joined in the same causes of action. That their interests were distinct, and not joint; and that there was not a common cause of action stated against them.

A. P. Floyd, for the plaintiff.

John Ganson, for the defendants.

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By the Court, MARVIN, J. It is not always easy to determine, from the present pleadings, to what branch of the law the pleader intends to refer, for the redress of his client's grievances. In the present case, however, there is no difficulty in determining that the facts stated in the complaint are not sufficient to show a cause of action entitling the plaintiff to the remedy given by the common law writ of nuisance, or an assize of nuisance. This writ at common law lay only in favor of one whose *freehold* was affected, and against one who erected the nuisance upon his freehold. Hence the parties to an assize of nuisance must be freeholders. (3 *Black. Com.* 222. *Vin. Abr. tit. Nuisance. Brown v. Woodworth, 5 Barb. 550. Ellsworth v. Putnam, 16 Barb. 565.*)

In the present case there is no allegation that the nuisance was erected by a tenant of the freehold. It is simply alleged that the defendant (meaning, I suppose, the Buffalo and Niagara Falls Rail Road Company) in the year 1852 erected, &c. a stone building across the alley; and then it is alleged that the Buffalo and Niagara Falls Rail Road Company transferred and conveyed the possession of the building to the other defendant, the New York Central Rail Road Company.

The revised statutes preserved the common law remedy by writ of nuisance, as theretofore accustomed, subject to certain provisions in the statute. At common law this writ only lay against him who erected the nuisance upon his freehold. It was, however, early provided by statute that the writ should lie against him and his alienee. And this provision is preserved in the revised statutes. The plaintiff is not to go without remedy, "because the land is transferred to another;" but the party who erected the nuisance, and his transferee, are both to be named in the writ as defendants. (2 *R. S.* 332.)

The plaintiff, under the code, must now aver all the facts necessary to bring his case within the law entitling him to an abatement of the nuisance, and to damages. (16 *Barb. 565.*)

The most that can be claimed in the present case is, that the action is simply an action to recover damages for the

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obstruction of the plaintiff's private right of way. Thus regarding it, was the demurrer well taken? We may reject the demand for judgment that the depot, &c. be taken down and removed, and leave the demand for judgment for damages only. The complaint states facts sufficient to show a cause of action against either of the defendants; or rather, a cause of action is shown against each defendant separately, but no cause of action against them jointly. It shows that the Buffalo and Niagara Falls Rail Road Company erected the buildings across the alley, and thus obstructed the plaintiff's right of way. It alleges that the other defendant, the New York Central Rail Road Company, keeps, continues and maintains such obstructions. Here facts are stated showing a cause of action against each defendant, but not a joint cause of action against both. What remedy have the defendants in such a case? May they demur? The defendant may demur when it appears upon the face of the complaint, 5th. "That several causes of action have been improperly united." (*Code*, § 144.) It is true that the *causes* of action are not incongruous, and that by section 167 they may be united. I speak of the *nature* of the actions. But one of the causes of action is against one defendant and the other cause of action is against another defendant. They are several causes of action, and cannot be united. An action against A., upon a note, cannot be united with another action, upon another note, against B. This, I think, would be an improper union of two causes of action.

I am not speaking of a case where the complaint shows a good cause of action against one of two defendants, but no cause of action against the other. In such a case the latter may demur; and this is the proper remedy for him. Some of the judges have, however, held that in such a case the defendants may demur; referring to the last clause of section 167, which provides that the causes of action united must affect all the parties to the action. All the causes for which a demurrer may be interposed are specified in section 144. Section 167 specifies what *causes* of action may be united. It

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is there declared that such causes of action must all belong to one of the classes, and must affect all the parties to the action &c., and must be separately stated, &c. Suppose the causes of action belong to one of the classes specified in section 167, but they are not *separately stated*. I have supposed that this was not a cause of demurrer, but that it was an irregularity, and that the remedy of the defendant was by motion.

Whatever construction may be given to sections 144 and 167, the present case, I think, comes within the 5th subdivision of section 144; that is, that the cause of action against the Buffalo and Niagara Falls Rail Road Company is improperly united with the cause of action against the New York Central Rail Road Company.

I am also inclined to the opinion that the defendants could have moved that the plaintiff elect which of the causes of action he would prosecute. It requires much liberality to sustain this complaint at all. The pleader had no idea of the construction now given to his complaint, and which saves it from dismissal. He supposed he had stated a single cause of action, entitling him to damages and an abatement of the nuisance. He will be permitted to amend his complaint. In doing so, he will probably discontinue, as to one of the defendants, and proceed against the other, for his damages.

The order appealed from should be reversed, and the defendants should have judgment upon the demurrer, with leave to the plaintiff to amend, on the payment of costs.

[ERIE GENERAL TERM, May 16, 1859. *Greene, Marvin and Davis*, Justices.]

BALDWIN *vs.* THE CITY OF BUFFALO.

Where the owner of land dedicates the same to the public for a street, and then grants the land in fee before the public has taken possession, or made any use of the same, and the grantee and those holding under him possess and occupy the land for more than twenty-five years before the public asserts any claim or right founded upon the dedication, all right in the public will be deemed to have ceased.

Where land worth \$1200 had been entered upon by a municipal corporation, under and by virtue of proceedings regular in form, for the purpose of opening a street thereon, and the sum of one dollar had been awarded to the owner, as a compensation therefor; *Held* that the owner was entitled to an injunction to restrain the corporation from proceeding further in appropriating the land and opening the street.

In such a case a common law *certiorari* would afford the owner no redress. It would not thereby be disclosed that the commissioners had not awarded him a just compensation. It could not be legally known that one dollar was not a just compensation for the land to be taken. *Per* MARVIN, J.

A suit in equity will lie, in favor of a land owner, against a municipal corporation, to restrain it, by perpetual injunction, from entering upon and taking possession of the land, and opening a street thereon, where the claim of the corporation is apparently valid, upon the face of the proceedings, and it is necessary to aver and prove an extrinsic fact in order to establish the invalidity of the proceedings; as, for example, that the commissioners have only awarded to the plaintiff one dollar for property worth \$1200.

A PPEAL from a judgment entered upon the report of a referee. The case is sufficiently stated in the opinion.

H. S. Cutting, for the plaintiff.

E. Thayer, for the defendant.

By the Court, MARVIN, J. The referee has found that all the material allegations in the complaint are true, and upon such facts he decided, as matter of law, that the complaint should be dismissed.

The object of the action is to obtain a perpetual injunction restraining the city of Buffalo from entering upon certain premises of the plaintiff, and opening a street thereon. The plaintiff, and those from whom his title is derived, had been

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in the actual possession of the land for more than twenty-five years, under grants in fee, and claiming title in fee to the premises, and it had long been inclosed and cultivated, and a portion of it used for an orchard. The defendant instituted proceedings, in due form, under and by virtue of its charter, for the purpose of taking the land and appropriating it to a street. The proceedings were regular. The defendants resolved to take and appropriate the land. The commissioners, appointed to ascertain and report the just compensation to be paid to the owner of the land, reported in April, 1847, and awarded to the plaintiff the sum of one dollar for the land. This sum was awarded upon the ground that the land was included in a street, running from Pine Hill road to Le Roy avenue, which had been dedicated to the use of the public by the Holland Land Company, and that therefore the plaintiff was not entitled to any compensation for the land so taken by the defendants for the street. The plaintiff alleges, on information and belief, that no such street was ever dedicated, opened or used; and that he has not acknowledged in any way such dedication, &c. The plaintiff objected to the report of the commissioners, but the common council confirmed it. The Holland Land Company conveyed the land to a grantee, whose title the plaintiff now has, more than twenty-five years prior to the confirmation of the report of the commissioners, and the land had been occupied and possessed during such time under that title. The land so to be taken and appropriated was of the value of \$1200. It is alleged that the defendant is about to enter upon the land, and open and grade the street, and alter the face of the soil, which will destroy it for its present uses, or any use beneficial to the plaintiff, and will produce great, permanent and irreparable injury to the plaintiff.

Enough of the allegations of the complaint are here presented to raise the questions upon which the decision of the referee was made, and the questions argued upon the appeal. It is not, however, quite apparent upon what ground the re-

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free dismissed the complaint; whether upon the ground that the land had been dedicated for a street, and that the plaintiff was bound by such dedication, or upon the ground that the plaintiff was not entitled to the remedy by injunction. I am inclined to think his decision founded upon the latter ground, as the plaintiff in his complaint asserts, upon information and belief, that no dedication of the land was ever made. It clearly appears from the complaint that the reason why the commissioners only awarded a nominal sum to the plaintiff for the land, was because they claimed that it had been dedicated by the Holland Land Company to the public for a street. I shall spend no time in ascertaining what the effect upon the rights of the parties would have been, if the Holland Land Company had dedicated the land to the public for a street, and then granted the land in fee, before the public had taken any possession or made any use of the land, and the grantee, and those holding under him, had possessed and occupied the land for over twenty-five years before the public asserted any claim or right founded upon the donation. I have no doubt that all right in the public, under such circumstances, had ceased before the proceedings, by the defendants, had been instituted.

It is declared by the constitution (*art. 1, § 6*) that private property shall not be taken for public use, without just compensation. In the present case, the private property was worth \$1200, and the commissioners have only allowed to the plaintiff, the owner, one dollar, and the defendant insists upon its right to take the property for public use, for this sum. It cannot be claimed that there has been any compliance with the provision of the constitution referred to, nor with the charter of the city of Buffalo, under which these proceedings were had. Yet the proceedings are all in due form, and until the fact appears showing the real value of the land, nothing appears to show that *just* compensation was not to be made.

The more important question in the case is, whether the

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plaintiff may claim the remedy by injunction to restrain the defendant from proceeding further, and taking possession of the land and opening the street? A common law *certiorari* would afford him no redress. It would not then be disclosed that the commissioners had not awarded him a just compensation. It could not be legally known that one dollar was not a just compensation for the land to be taken. Should the plaintiff wait until the defendant should actually enter upon his land, and change its surface by grading the street, and then bring his action for the trespass, and repeat the actions daily, if the defendant persisted in continuing the work? Again, would he be permitted to show, on such trials, that the commissioners had only awarded to him a nominal sum for property worth \$1200? It does not appear, from the report of the commissioners, that they awarded only \$1 *because* of a previous dedication of the land for a street. This fact appears only by the allegations in the complaint.

In *The Mayor &c. of Brooklyn v. Meserole*, (26 Wend. 132,) a leading case, and referred to by the defendant's counsel, the question discussed and decided was, whether the court of chancery had jurisdiction to interfere and arrest the proceedings in a street case, when the proceedings were *illegal*, so as confessedly to render them inoperative and void. It was held by the court for the correction of errors that it was not a proper case for equity jurisdiction and relief. In such a case a common law *certiorari* is undoubtedly the proper remedy, thus reviewing and reversing the proceedings. In the prevailing opinion in that case, the chief justice, after discussing the jurisdiction of the supreme and chancery courts, says, 1. When the proceedings in the subordinate tribunal, or the official acts of public officers, affecting the title to real estate, lead, in their execution, to the commission of irreparable injury to the freehold; or, 2. To a multiplicity of suits, a court of equity may interfere and prevent the mischief in the one case, and excessive and vexatious litigation in the other. In *Heywood v. The City of Buffalo*, (14 N. Y. R. 534,) it

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was held that the assessment was *illegal*, and the proper remedy was by *certiorari*, and that, as a general rule, courts of equity would not entertain an action for relief against such assessment. That such an action would, however, lie when it is necessary to prevent a multiplicity of suits, or irreparable injury; or when the assessment, on the face of the proceedings to impose it, is a valid lien on land, and extrinsic evidence is requisite to show its invalidity. Judge Johnson, in his opinion, says, the general doctrine seems to be fairly established, that the correction of errors in the proceedings and determinations of these inferior political jurisdictions, is matter of legal and not equitable cognizance, and especially where it is a mere question of power, as in that case, and there is no allegation of fraud or corruption in the body or the officers by whom the assessment is authorized or made. He adds, "The usual and undoubted remedy by *certiorari* is always open to every party conceiving himself aggrieved." He says, that even in those cases the general rule seems to be subject to three exceptions: 1. Where the proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions. 2. Where they lead in their execution to the commission of irreparable injury to the freehold. 3. Where the claim of the adverse party to the land is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proved in order to establish the invalidity or illegality. Whenever a case is made by the pleadings, falling within these exceptions, or either of them, equity will interpose to arrest the excessive litigation, or prevent the irreparable injury, or remove the cloud from the title.

It seems to me that the plaintiff's case might well be brought within all these exceptions, though I think it comes more properly within the third exception. The claim of the defendant is apparently valid upon the face of the proceedings, and it was necessary to aver and prove an extrinsic fact in order to establish the invalidity of the proceedings. That

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fact is, that the commissioners only awarded to the plaintiff \$1 for property worth \$1200.

An action could, I have no doubt, have been brought to set aside the proceedings, certainly the award of the commissioners. The plaintiff demands judgment for a perpetual injunction, and if this is awarded to him, it will be all he needs. He has probably asked for some other relief to which he may not be entitled. The pleader has interspersed along in his complaint some averments not necessary; such as that the proceedings of the common council were void, and that the defendant had exceeded its corporate powers, &c. These are averments of conclusions of law. He has stated the facts, however, which show that he is entitled to an injunction. The judgment should be reversed, and a judgment should be entered in favor of the plaintiff, perpetually enjoining the defendant from entering upon the premises and opening the streets, under any claim founded upon the proceedings of the common council to obtain the land for a street. The plaintiff should have costs.

[ERIE GENERAL TERM, May 16, 1859. *Greene, Marvin and Davis*, Justices.]

 DRAPER vs. TRESCOTT.

A creditor, who has agreed with the principal debtor, without the consent of a surety, to extend the time of payment of the debt, for a usurious consideration paid at the time, cannot avail himself of the usury, as rendering the agreement invalid, when the agreement, and the usurious consideration, are proved by the surety for the purpose of establishing a defense that he is discharged from his liability. JOHNSON, J. dissented.

THIS action was commenced before a justice of the peace of the county of Livingston. The plaintiff complained in writing on a promissory note, made by the defendant Trescott and one Erastus Wilkinson, dated August 19th, 1850, whereby

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they promised to pay G. F. Pratt or bearer, six months from that date, fifty dollars with interest. The defendant answered 1st. General denial; 2d. Payment; 3d. Discharge of Trescott as surety; 4th. Usury; 5th. Statute of limitations.

The testimony on the trial disclosed the following facts: That the defendant Trescott, and Wilkinson, made said note; Trescott signing it as surety for Wilkinson, with the knowledge of D. R. Scott at the time, that he was such surety; that the note was negotiated by Wilkinson to Pratt the payee therein; that said Scott afterwards owned the note, and the defendant Trescott paid the same to him, by giving his (Trescott's) note for the note in question and some borrowed money; that the note in suit was delivered up by Scott to Trescott, and remained in his (Trescott's) hands several months; that afterwards the note was re-delivered by Trescott to Scott; that before such re-delivery Scott made an agreement with Wilkinson, the principal maker, to wait on him five years for payment on the note; in consideration of which agreement on the part of Scott to wait, Wilkinson agreed to pay interest on the 1st of April in each year, *and to pay, and did pay fourteen shillings, (\$1.75,) over and above the interest, for Scott's waiting, &c.; that Scott got the note back again of Trescott in pursuance of such agreement to wait, &c.; after Trescott had paid and taken up the same, and the note was re-delivered to Scott, without any knowledge of the said agreement on the part of Trescott.* Upon the foregoing testimony the justice rendered a judgment in favor of the plaintiff and against the defendant for \$60.80 damages and \$1.94 costs. From said judgment the defendant duly appealed to the Livingston county court, which court affirmed the judgment; and from such judgment of affirmance Trescott appealed.

Wilkinson & Abbott, for the appellant.

G. Bulkley, for the respondent.

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T. R. STRONG, P. J. The question in this case is, whether a creditor who has agreed with a principal debtor, without the consent of a surety, to extend the time of payment of the debt, for a usurious consideration paid at the time, may avail himself of the usury, as rendering the agreement invalid, when the agreement and the usurious consideration are proved by the surety, for the purpose of establishing a defense that he is discharged from his liability.

It is declared by statute that all usurious contracts "shall be void;" and there is nothing in the language of the statute expressly qualifying those words; neither does the statute, in express terms, prohibit the creditor in such contract, or any natural person, from alleging and proving the usury when it may be for his interest to do so. But in reference to this statute, as to all others, the courts seek to ascertain its spirit and meaning, and to so administer it as to accomplish the object of its enactment. In numerous cases effect is given to some extent to contracts infected with usury; the word void is construed to mean voidable; and restriction is imposed in regard to making the objection of usury by other persons than the party paying, or contracting to pay, the usurious premium. Many of those cases are referred to in *Dix v. Van Wyck*, (2 Hill, 522.)

The policy of the statute of usury is the protection of borrowers against oppressive exactions by lenders. It is not essential to the promotion of this policy that other persons than the victim of the usurer, or persons standing in legal privity with him, should have the benefit of this statute; hence it is a rule well settled, that the objection of usury cannot be raised by a mere stranger to the usurious transaction. If the borrower prefers, as the best for his interest, in his opinion, or as required by a proper regard for honesty, to abide by his agreement, there does not seem to be any good reason why he should not be permitted to do so. He ought not to be compelled to accept the aid which the statute proffers, against the convictions of his judgment and conscience. The law allows

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him to pay the usurious debt, and will not aid him thereafter to recall what he has paid. So he may convey property in payment and the conveyance will be valid. On the same principle, he may waive the advantage of the statute; and it is a general rule that a person may waive the benefit of a statutory, or even of a constitutional, provision made for his advantage. And if the borrower does not insist upon the statute benefit, the lender ought certainly to be held to the contract. Like the party to a conveyance in fraud of creditors, he should not be heard to urge his own violation of the law as a reason why his agreement should be pronounced invalid. The borrower may do so, because such is the design of the statute; but it contemplates no favor to the usurer. There is a close analogy between the case of a usurer, and a party to a fraudulent conveyance, in respect to the right to claim a benefit from the usury or fraud. The usurious contract is declared void by statute; thereby, as the courts have held, meaning voidable, at the instance of the borrower and his privies. A fraudulent conveyance is declared by the statute to be void as to the creditors defrauded. The contract and the conveyance are alike illegal; but looking at the objects of the statutes, and limiting their operation to those objects, only those persons as to whom the contract or conveyance is void, can set up their illegality.

It is true that an agreement of extension, in order to discharge a surety, must be a valid agreement; one which the principal debtor might enforce against the creditor, and which therefore suspends the remedy of the surety to compel payment of the debt of the principal; but a usurious agreement is valid and may be enforced against the lender, and has such an effect upon the remedy of the surety, if the lender cannot make the objection of usury.

A distinction has been suggested between cases where the lender seeks to prove the usury to avoid the effect of the contract upon the liability of the surety, and cases where the surety proves the usury in making the defense of his discharge

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by the agreement; and it has been argued that if the usurer may not prove the usury for his advantage, he may have the advantage of it when proved by the surety. But this distinction has no foundation in principle. If the borrower may set up the usury, he may prove it for that purpose; and if he cannot set it up, he cannot avail himself of it when proved by his adversary. The argument in support of the distinction is, that as only a valid agreement will work the discharge of a surety, if the evidence given by the surety proves the usury, it shows an invalid agreement. But the answer is, as above stated, that it does not show an invalid agreement as against the usurer.

If a creditor who has agreed to extend the time of payment for a usurious premium paid, should commence a suit to collect the debt, it would be making the statute of usury a sword for slaying the borrower, whom the statute was specially designed to protect, if he could not defend the action upon his agreement. The extension contracted for might be more valuable to him than all the aid offered by the statute, and yet he would be refused it, and in addition lose what he had paid for it, if he omitted for a year after the payment to bring an action to recover back what he had paid beyond the legal interest.

It may be said that if the surety might avail himself of the agreement to give time for his discharge, the principal debtor might after the discharge of the surety, within a year, bring an action to recover back what he had paid; or if he had only promised to pay a usurious premium, that he might set up the usury in defense to an action on the promise, and that thus the usurer might lose both his claim on the surety and the consideration of the agreement; but the answer is, that this would be the penalty of his transgression.

In the present case, the usurious premium was paid at the time of making the agreement for further time; but it makes no difference in principle, in such cases, whether the premium beyond legal interest is paid down, or only agreed to be paid

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in future. The promise to pay is a simple consideration for the promise to extend, if the lender cannot set up the usury ; if he can set it up, whether the usurious consideration be paid, or only agreed to be paid, the promise to extend being executory, he may avoid it. In *Vilas v. Jones*, (10 *Paige*, 76,) a contrary doctrine is laid down, the agreement in the first case being held a discharge of the surety, but not in the latter. *Tudor v. Goodloe*, (1 *B. Monroe*, 322,) and *Kenningham v. Bedford*, (*Id.* 325,) are to the same effect ; but the reasoning in the cases has failed to commend the distinction to my judgment.

The case of *Vilas v. Jones*, above cited, in the court of appeals, (1 *Comst.* 274,) throws some light upon the question under consideration, but does not decide it. The views of three members of the court are given, but no opinion on the subject is expressed by the court. The case of *La Farge v. Herter*, (4 *Barb.* 346 ; 11 *id.* 159 ; 5 *Seld.* 241,) is somewhat distinguishable from the present, but essentially aids the foregoing reasoning. The decision of the court of appeals, in that case, is put upon the ground that the agreement for the satisfaction of the judgment was executed. What is said in the prevailing opinion in that court, about the guilty party being entitled to the benefit of the usury, if his opponent alleges and proves it as a part of his own case, means simply that the usurer in such a case, as a general rule, occupies his former position. Whether he would thereafter have a remedy against the surety is not decided.

The plaintiff in this case is a purchaser of the note in suit from the holder, with whom the agreement for further time was made, subsequent to the maturity of the note and the making of the agreement ; and of course he took the note subject to any defense which might have been made to it in the hands of the former ; and has no greater rights in respect to the agreement than the former possessed. My conclusion is, that it is not competent for the plaintiff to avoid for usury

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that agreement; and that by reason of the agreement the defendant, as surety, is discharged from such liability.

The judgment of the county court and that of the justice must therefore be reversed.

E. DARWIN SMITH, J. The only point presented in this case is, whether the surety is discharged from his liability by a usurious contract between the creditor and the principal debtor for the extension of the time of payment. This question was presented in several cases at the last term, and I have come in my own mind to the conclusion, as the result of all the cases cited and decided, that a contract otherwise unobjectionable, made between the principal debtor and the creditor for the extension of the time of payment, is valid when set up by the surety or by the debtor, to extend the time, and that it does not lie with the creditor who has received the consideration to allege the invalidity of the contract. He cannot be permitted at any time to set up, allege or prove that his contract is void. It is valid until the principal debtor—the borrower—elects to disaffirm it. The usurer cannot make such election. Usury as a defense, or an affirmative ground of action, is a personal privilege confined to the borrower alone and his representatives. (*Boughton v. Smith*, 26 Barb. S. C. Rep. 635.) This consideration seems to me to have been overlooked by the judges who express opinions in the case of *Vilas and Bacon v. Jones and others*, (1 Comst. 274.) But as there were other questions in that case, and as it does not appear, as the same is reported, that the court concurred in, or put the decision on, such opinions, I think we are at liberty to regard the point as an open one, and decide it according to our view of the question, upon principle. The argument on the other side of the question is that the surety must show a *valid* contract for the extension of the time of payment, to discharge him, and that a usurious contract is not a *valid* but a *void* contract, by statute. The error in this argument consists in holding that an usurious contract is *absolutely void*. The

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cases under the usury laws of this state uniformly hold that the contract is valid as against all persons, except the victim of the usury; that it is voidable only at his election, and unless and until he elects to disaffirm it for the usury, it is to be held, treated and enforced every where, and as against all persons, as a valid contract. (*Post v. Bank of Utica*, 7 *Hill*, 391. 10 *Wheat*. 367. 4 *Kern*. 131. 2 *Comst.* 131. 26 *Barb.* 633.)

I concur in the views of my brother STRONG, upon the whole case.

JOHNSON, J. (dissenting.) The question presented by this case is, whether an usurious agreement, to extend the time of the payment of a note, or other obligation, can be enforced against the creditors, where such agreement is proved, and insisted upon as valid, by the other party.

The statute declares all such agreements void. Not void in favor of one party, and valid against the other; but void absolutely and unconditionally against every party, and in all courts. Being void, how can the courts enforce them? Certainly they cannot, unless courts have some extraordinary power to make valid what the legislature have said should have no validity. The duty of the court is to administer the law, and whenever a contract is proved before it, which the statute declares void, it is the duty of the court so to pronounce it. Disregarding the statute is not administering it. I had supposed this question entirely settled in the case of *Vilas v. Jones*, (1 *Comst.* 274.) If however that case is not to be regarded as authority upon this question, the opinions of both the eminent judges, delivered in the case, ought to have no little weight upon this question. I think no judge, who took part in the decision of that case, doubted the soundness of the views expressed in the opinions upon this point. But, upon principle, how can any one be discharged from a valid obligation, by an agreement which is a nullity, and the enforcement of which the statute will not permit, when its vicious character is once shown? The proposition seems to me, I confess, nothing short of a legal absurdity. It seems to

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be supposed that the subsequent case of *La Farge v. Herter*, (5 *Selden*, 241,) is an authority to show that the plaintiff will not be permitted to say that the agreement to extend is void, by reason of its usurious character. But that case, in my judgment, has no possible bearing upon the question here presented. There the question was whether the usurer should be permitted to bring the evidence of his own turpitude before the court, for the purpose of avoiding an agreement apparently valid. And the court held that he should not be allowed to prove the usury.

But no such question arises here. Here the usury is proved by the other side. There is no question as to the character of the agreement. The court sees that it is corrupt, and usurious, upon the defendant's own showing. And now, the question is, can the court pronounce such a contract obligatory, and of sufficient force in law, to discharge the defendant from a valid promise to pay? I think not, as long as the statute remains unrepealed. It is precisely the exception stated by Ruggles, Ch. J., in his opinion in *La Farge v. Herter*. He says: "A party to a fraud is estopped from setting it up for his own advantage; but if his opponent alleges and proves it as part of his own case, the guilty party will then be entitled to the benefit, while he incurs the disadvantage resulting from such a state of things." Here, however, there is no question of estoppel. It may be that we should hold the plaintiff estopped from proving the usurious character of the agreement to extend, for his own advantage in the action. But the other party having proved it, the plaintiff is not estopped from asking us to look into the statute, and give some heed to its provisions; nor are we estopped from applying the statute to the corrupt agreement, and declaring it void, on the plaintiff's suggestion. It is a great and radical mistake to suppose that this statute was designed as an instrument to be used in the hands of the needy and compliant borrower, only. It had its origin in far higher considerations of public policy; and the commonwealth has an interest in hav-

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ing the statute fairly applied to every such contract, whether it operates, in the particular case, in favor of the borrower or lender. The statute was intended to prevent borrowing, as well as lending, at usurious rates. As the agreement to extend is clearly usurious, I see no other way than to say what the statute says, that it is void, and consequently had no effect upon the defendant's liability on the note.

Judgments reversed.

[CAYUGA GENERAL TERM, June 6, 1859. *T. R. Strong, Smith and Johnson, Justices.*]

HART vs. LAUMAN and others.

The defendants were partners, engaged in building the A. and H. rail road.

The plaintiff entered into a written contract with them to do a part of the excavation &c. on the road, and commenced work under such contract. Unexpectedly encountering a hard material, which was difficult of excavation, he gave notice to the defendants that he could not go on and excavate that material at the price named in the contract, and must abandon the work, unless the defendants would allow more than the contract price, for such material. The defendants told him to quit that portion of the work until some arrangement could be made in regard to it. The plaintiff did quit the work, for about two weeks, when it was resumed, under a new agreement, by which he was to have a reasonable compensation for excavating the hard material. *Held*, that this amounted to such a rescission of the original contract, in respect to that portion of the work, as would have precluded the defendants from maintaining an action to recover damages for its non-performance afterwards.

And the referees having found that the parties, after such rescission, made a new agreement, for the payment of a reasonable compensation to the plaintiff for that part of the work consisting of a hard material; it was *further held*, that such agreement was valid and binding, and would control, instead of the first agreement.

The defendants having agreed to pay ten per cent of the contract price of the work in the stock of the rail road company, and having failed to tender such stock until after it had become depreciated and utterly valueless; *Held* that they had by their own neglect forfeited their right to pay the ten per cent in stock.

It seems that under the contract, the plaintiff was entitled to the ten per cent

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in stock at its current market value, at the time payment should have been made or offered.

An agreement to pay a specified amount in the capital stock of a corporation, without naming any price, per share, or otherwise, is an agreement to pay stock to that amount in value, according to its market price, at the time.

And if performance of such a contract becomes impossible, by the depreciation of the stock so that it has no money value whatever, the amount agreed to be paid in stock is recoverable in money.

A stipulation, in a contract for work to be done upon a rail road, that all questions in dispute, as to any matters connected with, or growing out of, the contract, shall be submitted to and decided upon by the chief engineer and consulting engineers of the company, is no bar to an action upon the contract.

APPEAL from a judgment entered at a special term upon the report of referees. The complaint contained three causes of action. The first set forth, that about the 1st day of April, 1851, the plaintiff and one Simon Spear contracted with the defendants to do work on a rail road, which was done by the plaintiff, as was also other work not embraced in the contract, to the amount of \$10,856.14. The second set forth, that the defendants refused to allow the plaintiff to do certain portions of said work, and caused detentions in doing certain other portions, to the damage of the plaintiff of \$1568.25. The third cause of action was a general count for work, labor and materials, in which the plaintiff claimed to recover \$10,846.14. The answer set up six separate defenses. The first was a general denial of the whole complaint. The second set forth that on the 1st of April, 1851, the defendants made a contract in writing with the plaintiff and one Spear, to do work and furnish materials, on a rail road, at prices therein mentioned; which was done and furnished by the plaintiff, and paid for by the defendants according to said contract; and which work and materials were the same mentioned in the complaint. The third set forth that in 1851 the plaintiff did work and furnished materials for the defendants, on said rail road, to the amount of \$250, for which he was fully paid, and that it was the only work not embraced in said contract. The fourth alleged that the

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defendants had paid the plaintiff for all work &c. on said road, and all other work. The fifth alleged that the defendants had paid the plaintiff for all damages mentioned in the second cause of action; and the sixth set forth that the defendants had advanced to the plaintiff \$12,500, which remained due and unpaid, and which the defendants claimed to set off. The reply denied generally all the allegations of new matter, in the answer.

The action was referred to three referees, who made their report, by which they found due to the plaintiff \$4393.93, and from the judgment entered upon such report the defendants appealed to the general term. The judgment was reversed, on that appeal, and a new trial ordered. After a second hearing before the referees, they made their report, by which they found, as facts, that on or about the first day of April, 1851, the defendants were partners in building the Attica and Hornellsville rail road; that the plaintiff and one Spear, on or about that day, entered into a contract with the defendants in writing under seal, (a copy whereof was annexed to the defendants' answer,) to do a part of the work on the said road; that Spear afterwards, and with the consent of the defendants, assigned all his right and interest in and by the said contract to the plaintiff; that when the said contract was entered into as aforesaid, the sections of the road were marked out by stakes at either end; that after Spear had assigned to the plaintiff, and after the plaintiff had entered upon his work under the contract, the defendants, without the consent of the plaintiff, removed the stakes which marked the eastern terminus of the section 45, about 1500 feet westward, and took away from the plaintiff that portion of the road specified in the contract; that the plaintiff in building the road struck upon a hard material in section 42 of said road, which was of difficult excavation; and after he had excavated a portion of said hard material, and in or about the month of August, 1851, the plaintiff informed the defendant Lauman that he could not go on with said work for the prices named

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in the contract, and that he would abandon the work if the defendants would not allow him a greater compensation for excavating the said hard material; that Lauman told the plaintiff to quit that portion of the work until some arrangement could be made in regard to it; that the plaintiff did thereupon quit and abandon said portions of the work; that in about two weeks thereafter the plaintiff resumed said work, under an agreement with the defendants that they would allow him a reasonable compensation for excavating the material aforesaid; that the amount of said material excavated by the plaintiff, after said agreement, was 6100 cubic yards, and the value of the same 40 cents per cubic yard; that in or about the month of September, in the year aforesaid, the plaintiff and defendants made an agreement that the plaintiff should be paid for extra haul on sections 42, 43 and 44; that no price was agreed upon for such extra haul, but the value thereof was eight mills per cubic yard for each 100 feet of extra haul; that the amount of said haul was as stated and set forth in schedule C, annexed, amounting in the whole to \$1813.42; that while performing the work aforesaid, the plaintiff at the request of the defendants did other extra work, and found materials for them of the kind and value mentioned in schedule B, annexed; that all of the work done by the plaintiff under said contract, and under said contract as modified, and all the extra work done by him, and the material furnished as aforesaid, were done and performed to the satisfaction of the defendants, and accepted by them as satisfactory and complete; that all of the said work, except what is called extra work, hard material and extra haul, was done under and for the prices mentioned in said contract; that all of the work herein mentioned was allowed by the defendants to the plaintiff according to the conclusions and estimates of the engineer of the rail road company, so far as any estimates were made by him; that he never measured or made any estimate of the amount of embankment settled, nor did he make and return an estimate of the clear-

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ing and grubbing, according to the contract between the parties ; that the kinds and amount of work done by the plaintiff under and for the price named in said contract were as set forth in schedule A, annexed, amounting in the whole to the sum of \$12,522.23 ; that the extra work, except extra haul and materials done and furnished by the plaintiff as aforesaid, were set forth in schedule B, annexed, amounting in the whole to the sum of \$534.38 ; that the whole amount of work done by the plaintiff for the defendants and materials furnished as aforesaid, the value of which was found by the referees, was worth the sum of \$17,310.03, and was as set forth in schedule C, annexed ; and the referees found that the defendants paid the plaintiff thereupon the sum of \$12,111.72, and no more. And they also found as a conclusion of fact, that on or about the 19th day of December, 1857, the plaintiff went to the office of the defendants at Portage, N. Y., for a settlement, and demanded payment of whatever balance was due him for the work and materials aforesaid, and the referees found that the same was upwards of \$5000 ; and that the defendants by their showing on the trial and the basis assumed by them, made to have been due to him then about \$800 ; that the defendants then offered him in full payment of the amount due him \$18.93 in money, and an order on the treasurer of the rail road company, at Buffalo, for a certificate of \$550 of the capital stock of the said company and that the plaintiff refused to receive the same, in full payment, but in no otherwise refused ; that the value of the said stock at the time of the offer in payment as aforesaid was 90 cents on the dollar of nominal value, and at the time of the trial was worth nothing ; and the referees also found that, except the circumstances of the offer of the stock for \$550 as aforesaid, there was no proof before them that the defendants owned any of the stock of said company.

And the referees found as conclusions of law, that the plaintiff was not by any of the covenants of the said contract debarred from commencing an action in this court against the defendants to enforce any right which he might have thereby ;

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that the plaintiff was bound by the estimates of the engineer, so far as the same were made, for work done under said contract, but as to other work he was not so bound; that the plaintiff having made a demand, at the place of business of the defendants, of them, for the amount due to him, and the defendants having made a tender in full of an amount insufficient to pay that balance, the plaintiff was not obliged to take it; and that he is not now obliged to receive from the defendants any stock in payment of the balance which they found and reported due and payable to him, and that the whole of such balance was payable in cash.

And they decided and reported that the plaintiff was entitled to recover and have judgment against the defendants for the sum of \$5198.31, and costs. From the judgment entered upon that report, the defendants again appealed.

H. S. Cutting, for the appellants.

James C. Smith, for the respondent.

By the Court, JOHNSON, J. The referees have found, upon the new trial, that 6100 cubic yards of hard pan were excavated, under a new and separate agreement, by which the plaintiff was to receive a reasonable compensation for his services in making such excavation, which they find to be forty cents per cubic yard. This agreement, upon the new finding, was a valid one. The plaintiff, according to this finding, after unexpectedly encountering this hard material, gave notice to one of the defendants that he could not go on and excavate this material at the price named in the contract, and must abandon the work, unless the defendants would allow more than the contract price for such material. The defendant Lauman, to whom this notice was given, then told the plaintiff to quit that portion of the work until some arrangement could be made in regard to it; and the plaintiff did quit it for about two weeks, when it was resumed under the new

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agreement. It is plain, I think, that what took place between the parties, followed as it was by the plaintiff's quitting the work, was such a rescission of the original contract in respect to that portion of the work, as would have precluded the defendants from maintaining an action to recover damages for its non-performance, afterwards. The parties were then in a situation to make a new agreement, for that part of the work, which would be binding, and would control, instead of the first agreement. It is claimed on the part of the defendants, that the evidence does not warrant this finding of the referees. But there is certainly evidence tending to this conclusion of fact, and indeed the whole evidence shows, quite conclusively, that the defendants did not expect the plaintiff to take out this hard material, at the price specified in the contract for common earth. I do not think we would be justified in setting aside the report of the referees, upon this branch of the case, on the ground that it is without evidence to support it.

The question of the right of the defendants to pay ten per cent of the contract price of the work in the stock of the railroad company, is now presented in an aspect materially different from that in which it was presented by the former report. We then held that inasmuch as the defendants had not refused to transfer the stock, but had, on the contrary, offered to do so in a manner not objected to by the plaintiff, they had not forfeited the right to pay the amount specified in such stock. No question as to the value of the stock arose on the former trial; the only question then being, whether the defendants had offered a sufficient amount in stock at its nominal or par value. It now appears, from the report of the referees, that at the time the offer, such as it was, to pay in stock was made, such stock was worth only ninety cents on the dollar, of nominal value; and that at the time of the last trial it was utterly worthless, having no value whatever.

The defendants, on that occasion, offered the plaintiff \$18.93 in money and an order on the treasurer of the company, at

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Buffalo, for a certificate of \$500 of the capital stock of the company, as payment in full of the amount due him. This was refused by the defendant, on the sole ground as found by the referees, that it was not sufficient to pay the amount due. The referees find that there was at least \$800 due from the defendants to the plaintiff, upon the grounds assumed and claimed by them, and upwards of \$5000, in point of fact. The plaintiff, of course, was not bound to take the two amounts, or either of them, as it was offered. No question seems to have been raised between the parties as to the value of the stock, or whether it was to be received at its nominal, or at its market value, by the plaintiff; as a sufficient amount was not offered in either case; and all the plaintiff was called upon to do was to decline accepting it as offered. The question now arises whether the defendants can now pay the ten per cent in stock, and whether their right to do so is not necessarily forfeited in consequence of the stock having become utterly valueless in their hands, before they have performed or offered to perform according to the agreement. It is to be inferred, I think, that the defendants were the owners of the stock, or of a sufficient amount thereof to have satisfied the first demands of the plaintiff; and it was in their power at any time to have discharged their obligation by tendering the amount in stock actually due, which they have failed to do. The question whether they should have tendered the amount due, at its current market value, or at the nominal value of the shares, does not necessarily arise here, as they made no sufficient tender, or offer of payment, while the stock had any real or market value, and it has now passed beyond all valuation, for any purpose. I am inclined to the opinion, however, that the plaintiff, under the contract in question, was entitled to the ten per cent in stock at its current market value at the time payment should have been made or offered. Stock in a corporation is not money; nor is the certificate by which the ownership of it is evidenced, in any sense the representative of money; nor is it an obligation or security for the

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payment of money. It is personal property merely, of a peculiar kind, it is true, but still a personal and marketable commodity, having a market value the same as any other commodity, which is the subject of bargain and sale in the market. (*Mechanics' Bank v. New York and New Haven R. R. Co.*, 3 Kern. 627. *Bouv. Law Dic. Stock*.) By the terms of the agreement the defendants undertook to pay ten per cent of the amount earned under the contract, in the capital stock of the corporation, without any price per share, or otherwise, named in the agreement. This was, I think, an agreement to pay stock to that amount in value, according to its market price at the time, the same as though payment was to be made in any other kind of personal property which has no uniform and fixed price. This being so, payment in stock is rendered impossible, and the defendants, by their own neglect, have forfeited and lost all right to pay the ten per cent in the stock of this corporation. At the time the agreement was entered into, the stock had a money value, and it was this value which the parties had in contemplation, and which was to extinguish the indebtedness. The contract would not, therefore, be performed according to the meaning and intent of the parties, by the transfer of any amount of capital stock, however large, nominally, without any money value whatever.

It is obvious that an obligation to pay a definite sum in grain or any other personal property would not be performed by a tender of property of that description, so injured or decayed as to be utterly valueless. It seems to me, therefore, as the obligation cannot now be performed by the transfer of the stock specified, the amount is necessarily recoverable in money. It was no part of the intention, in making the agreement, that the plaintiff should lose the ten per cent, and the law will provide a remedy to prevent such a loss. In the case of *Moore v. Hudson River R. R. Co.*, (12 Barb. 156,) the plaintiff agreed to take the stock at par.

The stipulation in the agreement, that all matters in dispute, as to any matter connected with, or growing out of, the

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contract, should be submitted to and decided upon by the chief engineer and consulting engineers of the company, was no bar to the action. (*Haggart v. Morgan*, 1 *Seld.* 422.)

The engineers' estimate of twenty-five cents per cubic yard, for the hard material, is not conclusive upon the plaintiff, as to value or price. If there was no agreement as to price, he was entitled to what it was reasonably worth to make the excavation. The estimate may afford some evidence of a price fixed, but it is not conclusive; and the referees have found that no price was agreed upon, but that the plaintiff was to have what it was worth.

The monthly estimates were not conclusive as to the amount of work done, and the receipt of payment thereon did not operate as a final settlement and adjustment of the work from month to month.

Several other questions were raised, though not much pressed upon the argument; but it seems to me there is nothing in any of them which would warrant a reversal of the judgment.

On the whole, I am of the opinion that the judgment must be affirmed.

[CAYUGA GENERAL TERM, June 6, 1859. *T. R. Strong, Smith and Johnson*, Justices.]

 SIMONS vs. MONIER.

Where a servant, employed to work upon a farm by the month, directs his son, an infant, under his control, to do an act upon the farm, which is within the scope of the servant's employment, such act will be considered the act of the servant, and if another person sustains damage by the negligent manner in which the act was performed, the master is liable.

Where a servant, employed to work upon a farm, is directed by the master to summer fallow a particular piece of ground, the cutting and removing of the brush growing upon it is a necessary incident to the preparation of the

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ground for the plow, and will be held to have been embraced in the general directions.

The rule of liability against a master for the act of his servant, is the same precisely, whether the servant is employed in the care and management of real or personal property; except, perhaps, in the single instance where the act complained of, in respect to real estate, amounts to a nuisance.

The master's liability does not extend to the negligent acts of his servant's agent or servant, unless the servant of such master has directed the particular act, or is so connected with it as to make the negligence his own, in fact as well as in law.

Where a servant employs another to do the work, generally, which it is his duty to do, and the agent, while so employed, of his own volition, and without the knowledge or direction of the servant employing him, does an act which occasions an injury to a neighbor, his act will be imputed to, and charged upon, his employer, and not upon the master.

In an action to recover for damage done to the plaintiff's land, and the wood and timber thereon, through the negligence of the defendant in setting fire to brush on his own farm, it is erroneous to ask a witness, from what he saw, how much damage the fire did to the plaintiff's farm; on the ground that it calls for an opinion from the witness on a question of damages, which belongs to the jury to determine. (SMITH, J., dissented.)

PRIOR to and on and after the 17th day of July, 1854, the plaintiff was the owner, and in the occupation and possession of a farm or tract of land lying in the town of Prattsburgh, in the county of Steuben, containing eighty-one acres of land, about 35 or 40 acres of which was improved and under cultivation, and the residue was wood land. The defendant was at the same time the owner and occupant (by his hired servant, Seth Terry, who resided upon the same) of a farm or tract of land, bounded on the south, in part, by the said farm of the plaintiff. The farm of the defendant was partly improved, and was cultivated by the defendant as a farm by the said Seth Terry, who was in the service of the defendant, hired by him to carry on the said farm, and resided in the house upon it. In the course of his farming operations, Seth Terry, in clearing up and plowing an old pasture field on the south side of the defendant, cut a large quantity of brush growing upon it, and piled it into heaps for burning, extending along the south side of the field, at the distance of

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four to six rods from the woods and an old brush fence that enclosed the field on that side. The summer of the year 1854 was one of unprecedented drouth, and the woods were every where in a more combustible state than ever known before or since, and fires were running through the woods every where in that part of the country to a greater extent than had ever been known. On the 17th day of July, the woods nearest to the brush heaps above mentioned, and the old brush fence adjacent, were so dry and combustible that common prudence and ordinary care and skill forbade the burning of those heaps of brush, because, under the circumstances, it was almost inevitable that the fire would break out into the woods. At or about noon of that day, the said Seth Terry, for the purpose of clearing the field above mentioned, directed his son, John Terry, a lad then living with him and subject to his control, to set fire to the brush heaps, which he immediately did. A strong northwest wind prevailed at the time, and blew the fire directly into the brush fence and woods adjoining, so that in less than half an hour it had spread through the woods, and extended so far as to be beyond control. As soon as Terry had directed his son to set fire to the brush heaps he left him, and went to work upon another part of the farm, at a considerable distance off, without taking any precaution to prevent the fire communicating to the woods; nor did he, after it had broken out there, take any efficient means to prevent its extension. In the course of the night of the 17th of July and the day following, the fire burned over the whole of the plaintiff's woods, destroying the greatest part of the timber, and doing him damage to a large amount, notwithstanding his exertions to prevent it. This action was brought to recover for the damages thus occasioned by the act of the defendant's servants. On the trial the plaintiff recovered a verdict for \$175, and from the judgment entered thereon the defendant appealed. The material facts appearing on the trial, and the ruling and charge of the judge, are referred to in the opinion of the court.

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E. B. Pottle, for the appellant.

Wm. Howell, for the respondent.

JOHNSON, J. The defendant's counsel requested the judge to charge the jury that John Terry was not the servant of the defendant, but of Seth Terry, and that the defendant was in no way responsible for his acts. The judge refused so to charge, and charged in substance that the act of John Terry, in setting the fire, was the act of Seth Terry, and that, if it was negligent to set the fire at the time, and under the circumstances described by the witnesses, then the plaintiff was entitled to recover. Seth Terry was the defendant's hired servant, and worked on the farm on which the fire was set, by the month. John Terry was the son of Seth, but was not in the defendant's employ; and so far as the evidence shows, there was no legal relation whatever between John and the defendant. The setting of the fire, which the jury have found was a negligent act, was done by John at the time, by the express direction of his father. Upon this state of facts the judge, I think, was clearly right in instructing the jury that the act of setting the fire was the act of the father. It was his immediate personal act; for although it was done by the hand of the son, the hand was directed, guided and controlled by the mind and will of the father. It was the father's will and volition exclusively. It was his carelessness, and not the carelessness of the son. It was precisely as much the act of the father as though he had used some other means or instrument in conveying the fire and kindling the flame. This being so, the defendant was clearly liable, if the setting of the fire was within the scope of the employment of Seth Terry as a hired servant upon the farm. Of this, it seems to me, upon the undisputed facts, there can be no doubt. He had been directed by the defendant to summer fallow the piece of ground where the fire was set. In order to prepare the ground for the plow, it became necessary to cut and remove the brush

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growing upon it. This preparation was an essential part of what he was required to do. It was clearly a necessary incident, and must be held to have been embraced in the general directions. It was the careless manner in which he undertook to remove the brush so cut, in respect to time and circumstances, which constitutes the alleged cause of action. It is claimed by the defendant's counsel that this question, as to whether the removal of the brush was within the scope of the employment of the servant, should have been submitted to the jury as a question of fact to be found by them. But I think it was clearly a question of law upon the undisputed facts, as to which there was no conflict of evidence, and the judge might properly have charged directly, what seems to have been assumed, that the cutting and removal of the brush was a part of the work of summer fallowing the land, and was within the scope of the employment.

It is objected that the jury were charged that the defendant would be liable, if the act was negligent, whether the act was within the scope of the servant's employment or not, as it was done by a person who worked on the premises. The charge in its commencement would seem to bear such a construction, and to lay down as a rule of law the doctrine first asserted by Rooke, J., in *Bush v. Steinman*, (1 Bos. & Pull. 404,) "that a man who has work going on upon his premises and for his own benefit, must be civilly answerable for those whom he employs; that it shall be intended by the court that he has control over those who work upon his premises, and he shall not be allowed to discharge himself from that intendment of law by any act or contract of his own." This doctrine, which strikes at the very foundation of the rule which makes the master liable only for the negligent act of the servant while engaged in the business he was employed to transact, has frequently been repeated in other cases since, by judges both in England and in this state; but no case which turned upon that question has, I think, been decided in England or here. It was, however, for a time, assumed by judges

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to be the law, and a distinction was attempted to be founded upon it between persons engaged in working for another upon real estate, and those entrusted with the care and management of personal property. The existence of such a distinction was assumed by the chancellor in *The Mayor &c. of New York v. Bailey*, (2 Denio, 433,) and by Harris, justice, in *Gardner v. Heartt*, (2 Barb. 165,) though in neither case was it necessary to sustain the decision made. But it has since been expressly held that such a distinction, which never had any foundation whatever in reason, has none in law, and that the doctrine was never law, either in England or in this state. (*Reedie v. Railway Co.* 4 Wels. Hurlst. & Gord. 244. *Hobbet v. Same*, *Id.* 254. *Blake v. Ferris*, 1 Seld. 48, and cases cited in opinion of Mullett, J.) These decisions establish the rule of liability against the master for the act of the servant to be the same precisely, whether the servant is employed in the care and management of real or personal property, except perhaps in the single instance where the act complained of, in respect to real estate, amounts to a nuisance. To this extent, therefore, the charge was erroneous. But it could, by no possibility, have prejudiced the defendant, because, as we have seen, as matter of law, the servant in setting the fire, was engaged in the business he was directed to pursue. It was a mere abstract proposition of law, which had no bearing upon the case made by the evidence, and as no one could have been prejudiced by it, no exception will lie upon it. There is, therefore, no error in the charge for which a new trial should be granted. The case would, as I conceive, have stood entirely different had the son been employed by the father to do the work generally, which it was the duty of the father, as the defendant's servant, to perform, and had he, while so employed, of his own volition, and without the knowledge or direction of the father, set the fire in question. The son, under such circumstances, being the servant of the father, and not of the defendant, his act would have been chargeable upon the father as master, and not upon the defendant. The neg-

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ligent act in that case would have been the act and negligence of the son, and in no sense that of the father, except by mere legal relation; and as the defendant never selected him, nor authorized any one to do so in his behalf, and never entrusted any business to his management and discretion, there could be no ground on which to charge the defendant with his negligent acts. The legal relation upon which the master's liability rests would in such case be entirely wanting. The master's liability does not extend to the negligent acts of his servant's agent or servant, unless the servant of such master has directed the particular act, or is so connected with it as to make the negligence his own, in fact as well as in law.

There is one ground, however, on which a new trial must unavoidably be granted. The plaintiff's counsel upon the trial asked a witness, from what he saw, how much damage the fire did to the farm. This was objected to, on the part of the defendant, on the ground that it was incompetent, as calling for an opinion from a witness on a question of damages which belonged to the jury to determine after hearing all the facts. The objection was overruled, and the defendant's counsel excepted. The witness thereupon gave his opinion that the farm had been damaged to the amount of \$5 per acre. This was clearly erroneous. It was putting the witness directly in the place of the jury. (*Morehouse v. Mathews*, 2 Comst. 514. *Paige v. Hazard*, 5 Hill, 603. *Dunham v. Simmons*, 3 id. 609. *Fish v. Dodge*, 4 Denio, 311.) The order at special term refusing a new trial, must therefore be reversed, and a new trial granted, with costs to abide the event.

T. R. STRONG, J., concurred.

E. DARWIN SMITH, J., (dissenting.) I cannot concur in the decision that the question put to the witness, Jacob Williams, is objectionable. It is only when questions of this nature require or admit an answer compounded of law and

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fact that they are inadmissible. The question in this case was not of that kind. It simply inquired of the witness what the extent of the damages from the fire was to the lot. It asked him, in effect, the extent of the depreciation in the value of the lot, occasioned by the fire. It was, in my opinion, just as legitimate and proper in such a case to ask a witness the damages or the extent or measure of the damages done to the lot by the fire, as to have asked him in any other form of inquiry for the same opinion or judgment. It was merely asking his opinion of the value of the property after the fire; he and other witnesses having given their opinion of its value before. The word *damages* is merely equivalent, in force and signification, with the word *injury*. There is no inherent mischief or illegality in the word *damages*, or error or wrong in its use in such a sense. It was used here in its ordinary common acceptance, and not in any artificial or technical sense. And the answer to it shows that it was so understood, and that improper evidence was not obtained by it from the witness, if such evidence was called for, or might have been given, in response to the question. The question put to the witness, in this case, was, "From what you saw, how much damage did the fire do to the *farm*?" In the case of *The Rochester and Syracuse Rail Road Co. v. Budlong*, (10 How. 294,) which was a general term decision in this district, Judge Selden said: "If the question was, 'what is the amount of the damage or injury to the *horses* arising from the defect?' the question would be proper. It would be absurd," he says, "to exclude this question, as calling for an opinion as to the damages, and not as to value. The difference is merely verbal." So, also, the same judge, in *Dewitt v. Barly*, (17 N. Y. R. 345,) speaking of the case of *Morehouse v. Mathews*, (2 Comst. 514,) says: "Had the inquiry in that case been, 'what was the damage or injury to the *cattle* in consequence?' &c., it would have been unobjectionable." The question of damages in many cases depends upon the difference in value between property in one state and its condition in

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another. That was this case; but evidence of *opinion* in respect to value, is not to be excluded for that reason. When the question in its form does not embrace an inquiry as to the *legal rule of damages*, it is admissible and proper. (17 *New York Rep.* 344.) Such was not the case here.

The case of *The Rochester and Syracuse Rail Road Co. v. Budlong*, (*supra*), was before me at the circuit, and the question objected to under consideration, was allowed on the authority of that case. I think that case was rightly decided, and I cannot concur in overruling it.

New trial granted.

[CAYUGA GENERAL TERM, JUNE 6, 1859. *T. R. Strong, Smith and Johnson*, Justices.]

BABCOCK vs. BRIDGE and others.

On the 12th of March, 1855. P. executed to B. a mortgage, which recited that B. had signed as surety for P. a note made by P. for \$1500, dated on that day, and payable to the Rochester City Bank ninety days after date; and that B. had agreed with P. to sign as surety, or indorse, other notes for P. payable at the Rochester City Bank, or some of the other banks in Rochester, to an amount not to exceed \$7000. The mortgage contained a condition that P. should indemnify B. and save him harmless against said note of \$1500 and against all other notes which B. might sign as surety or indorse with or for P. On the 5th of July, 1855, B., at the request and for the accommodation of P., signed, as surety, a note made by P. for \$1000, payable to W. or bearer, twelve months after date.

Held 1. That assuming that the note last mentioned was embraced in the condition of the mortgage, the mortgage was security to B. in respect to two classes of notes which he might sign or indorse for P.; first the note for \$1000 already executed, payable at the Rochester City Bank. and other notes payable at any of the other Rochester banks, not in the whole to exceed \$7000; and second. notes payable elsewhere, or not mentioning any place of payment, to an indefinite amount.

2. That the note of July 5. 1855, for \$1000, belonged to the second class of notes, and that the mortgage, in reference to that note, must be regarded and treated precisely as if B. was indemnified, by the mortgage, only as to the second class of notes.

3. That in respect to that note the mortgage was not entitled to priority, under the recording acts, as against a junior mortgagee in good faith; the defect in

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such mortgage as constructive notice, under those acts, being that no limit to the extent of B.'s liability in regard to the second class of notes, was fixed; that it might be increased indefinitely; and that it afforded a dangerous facility for a fraudulent substitution of notes.

THIS action was brought to enforce a mortgage bearing date March 12, 1855, executed by Hiram Peets to the plaintiff, conditioned as follows:

"Whereas the said Alexander Babcock has this day signed as surety, a note bearing date the 12th day of March, 1855, executed by the said Hiram Peets and payable to the Rochester City Bank, for the sum of \$1500 in ninety days after date; and whereas the said Alexander Babcock has agreed to and with the said Hiram Peets, to sign as surety, (or indorse the same,) during the ensuing year, other notes for the said Hiram Peets, payable at the Rochester City Bank, or at some of the other banks in the city of Rochester, for such sum or sums as the said Hiram Peets may desire to raise, but not in the whole to exceed the said sum of \$7000. Now, therefore, the condition of this mortgage is such, that if the said Hiram Peets shall, from time to time and at all times hereafter, indemnify and save harmless the said Alexander against said note of \$1500, and against all other notes which the said Alexander may sign as surety or indorse with or for the said Hiram Peets, and against all damages, costs and trouble which he may sustain or be put to by reason of the non-payment thereof, by the said Hiram Peets, then this conveyance shall be void."

The defendant Bridge became a junior incumbrancer to the amount of \$5000 on the same premises, April 1, 1857. S. M. and A. B. Spencer became junior incumbrancers Feb. 16, 1856, for any liability they might incur for Peets, by advances, indorsements or acceptances, and they, in May, 1858, enforced their mortgage for \$1707.22, making Bridge a party, and sold the premises September 2, 1858. These were bid off by Samuel M. Spencer, for that sum, who in consideration of the payment of it by Bridge, conveyed the premises to him. The plaintiff sought to enforce the mortgage to him of March 12,

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1855, in consideration of his having paid the following promissory note :

“ *Pittsford, July 5, 1855.*

Twelve months after date, we jointly and severally promise to pay Roswell Wickwire or bearer, one thousand dollars, for value received, with interest.

(Signed) HIRAM PEETS.

A. BABCOCK, surety.”

The complaint described the condition of the mortgage, omitting, or as not containing *the recital*. On the trial before the referee, the plaintiff's counsel proved the mortgage of March 12, 1855, containing the recital, and the defendants' counsel objected to its being read in evidence, on the ground of its not being the mortgage described and set forth in the complaint. And also objected to the reading in evidence the promissory note of July 5, 1855, as evidencing moneys secured by the mortgage of March 12, 1855.

The defendants' counsel insisted that the mortgage was not a valid and subsisting lien in favor of the plaintiff, on the said premises, for the moneys he had been compelled to pay by reason of signing the promissory note of July 5, 1855, as against the right and title of the defendant Bridge, as a junior incumbrancer, or purchaser of the premises. The referee decided that the mortgage was a good, valid and subsisting lien on the premises, in favor of the plaintiff, for his said liability, as against the right and title of the defendant Bridge, and ordered judgment accordingly ; to which decision the defendants' counsel excepted ; and from the judgment entered upon the report of the referee, the defendant Bridge appealed.

Wm. H. Greene, for the appellant. I. The recital contained in the mortgage is an essential and substantive part of the instrument, and the condition is to be construed and limited by it. That the recital is the proper key to the meaning of the condition ; that the condition must be construed in reference to it ; that when the words of an obligation import a

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larger liability than the recital contemplates, these words will be restrained by the particular recital, are indisputable rules in the construction of such instruments. (*Hassel v. Long*, 2 M. & Sel. 363. *Peppin v. Cooper*, 2 B. & Ald. 431. *Sanson v. Bell*, 2 Camp. 30. *Payler v. Hamersham*, 4 M. & Sel. 423.) Language, however general in its form, when used in connection with a particular subject matter, will be presumed (in the construction of all instruments) to be used in subordination to that matter, and therefore to be controlled and limited accordingly. (*Story on Agency*, § 62, *applied to the construction of letters of attorney*.) Words of recital in a deed will constitute an agreement between the parties on which an action of covenant may be maintained. (*Severn v. Clerk*, 2 Leon. 122.) The recital in a deed of a previous agreement, is equivalent to a confirmation and renewal of the agreement. (*Saltoun v. Houstoun*, 1 Bing. 433. *Sampson v. Easterby*, 9 B. & Cress. 505.)

II. Construed in the light of the recital, the general words of the condition are used in subordination to the particular contract there stated, namely : Babcock contracts with Peets to sign with, or indorse his notes as surety, to borrow money during the year, made payable at the Rochester City Bank—or on notes similar to the one recited. (1.) The recital discloses that on the day of the date of the mortgage, viz. March 12, Babcock had signed as surety a note made by Peets for \$1500, payable to the Rochester City Bank in ninety days after date. (2.) That Babcock had agreed to sign as surety, or indorse, *other* notes for the said Peets, payable at the Rochester City Bank or at some of the other banks in the city of Rochester. (3.) That the object of this contract is to enable Peets to borrow money during the year in such sum or sums as he may desire. (4.) That the object of the transaction is not only a borrowing of money, but doing it on short paper payable at banks in the city of Rochester. The recital therefore deals with the promissory note then made, and secondly with the *other notes* of the same kind, as the particular sub-

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ject matter of the contract by which the condition is to be limited and restrained. The condition is thus framed in reference to the particular subject matter. Instead of attempting to introduce a new subject matter, or to enlarge itself beyond the matters recited, the words of the condition are to secure Babcock "against the said note of \$1500, and against all *other notes*," &c. The term "*other notes*," relates to the same term in the recital as significantly and necessarily as the term "*the said note of \$1500*" does to the note of March 12, of \$1500. The expression "*other notes*" in both recital and condition, are identical, and mean the notes of the same kind of that of March 12, which Babcock had agreed to sign, or indorse, as he had that day signed or indorsed the one described, for the purpose of borrowing money, which was the object of the whole transaction. When particular words are followed by general words, the rule in all kinds of contracts is to construe them as applicable to subjects *ejusdem generis*. (See authorities cited; also 1 Cowen, 122; 1 How. 169, 184; 9 Mass. R. 235; 19 John. 97; 16 id. 110; 1 Edw. Ch. 34; 2 How. 426, 449; 18 Pick. 325.) The words "the said note," and "all the other notes," in the condition, have their respective antecedents clearly in the recital, and no rule of construction or logic allows either of those terms to be separated from its antecedents. Had the words "all other notes," in the condition, no antecedent in the recital, there would be a new subject matter introduced into it, plainly betokening the intention of the parties to extend the scope of it: for instance, had the recital stopped with the statement of the note of March 12, omitting the contract of Babcock to indorse "*other notes*" of a like kind, the use of the words "all other notes," in the condition after "*the said note of \$1500*," would indisputably enlarge the scope of it by introducing a new subject matter. But now these words, "all other notes," have their representative in the recital, as much as "the said note of \$1500"—and it becomes repugnant and impossible to construe these words as meaning more in the condition than they did in the recital. The condition there-

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fore means to secure Babcock for just what his contract bound him to do, and nothing more or different, namely, to indorse Peets' notes, payable at the banks in the city of Rochester, on short time, during the year, for loaning money in such sums as suited Peets. The question is, what is the legal obligation of Babcock? Is it to sign or indorse any note not payable at the stipulated place, or for any purpose other than for the borrowing money in the way stipulated? There is no evidence even by parol, of any other contract or consideration at the time, as between mortgagor and mortgagee than what the recital discloses, and the security could not be kept alive by virtue of any subsequent agreement for other objects than those contemplated at the time of its creation. (*Truscott v. King*, 2 *Selden*, 147. *Mead v. York*, *Id.* 449.) (5.) The note in question does not come within the description of the notes which by the contract or the recital, Babcock would be bound to sign or indorse. The plaintiff does not show that it was given for the purpose of borrowing money, or but that it was given for the purchase of land, &c. It is payable to bearer at twelve months; four months beyond the year stipulated. It is payable at large and not at the place stipulated.

III. The contract thus recited as the consideration of the mortgage is an express written contract and cannot be enlarged or varied.

IV. Assuming the general words of the condition in the mortgage, to override the recital and to embrace *all other notes of any kind*, then if it has this scope and extent, the instrument as between a junior incumbrancer or purchaser and Babcock, is inoperative and void. Stripped of this recital or the legal effect of it upon the condition, the generality and uncertainty of the condition would enable the parties to use the security for other purposes than any at first contemplated, by a subsequent oral agreement, thus keeping it alive *ad infinitum*. No court would have the means of determining whether the object for which the mortgagee is enforcing it, was the object for which it was originally created. An in-

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strument thus uncontrolled in its reach and construction, does not comply with the rule "that the agreement as contained in the *record of lien*, whether by mortgage or judgment, should give all the requisite information as to the extent and certainty of the contract, so that a junior creditor may by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance. (*Truscott v. King*, 2 *Selden*, 161.) The character of the liabilities is not given, because the specification of promissory notes does not denote it. Any liability in the whole circle of human affairs, may readily be put into that shape. This is not a sufficient specification of the foundation of the liabilities contemplated. Such an instrument, from its susceptibility of being used for any purpose the parties to it choose, evidences in the eye of the law their intention to do what they can do by means of it, namely, hinder, delay and defraud creditors. (24 *Barb.* 510.)

V. If not, however, inoperative and void as an insufficient notice to a junior incumbrancer, it only operates as notice to the extent of Babcock's liabilities; it showed he was under a legal obligation to sign or indorse.

W. F. Cogswell, for the plaintiff, insisted that the note in question was embraced in the condition of the mortgage, and that the judgment should be affirmed.

By the Court, T. R. STRONG, J. In the view I take of this case, it is not important to determine whether the note, for the collection of which the mortgage in question is sought to be enforced, is embraced within the general words of the condition of the mortgage. It is clear that it is not of the description of notes the defendant had agreed to sign as surety or indorse for Peets to a limited amount, according to the recital in the condition; as the latter were to be payable at the Rochester City Bank, or some of the other banks in the city of Rochester, and this note is payable at large. If it comes within the condition, it is because of the general language ex-

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pressing that the mortgage is an indemnity against the note particularly described, which had been executed, "and against all other notes which the said Alexander may sign as surety or indorse with or for the said Hiram Peets," &c. Assuming then, that the condition embraces this note, the mortgage was security to the plaintiff in respect to two classes of notes which he might thus sign or indorse; one class comprehending the note already executed, which was payable at the Rochester City Bank, and other notes payable at one of the aforesaid banks, not in the whole to exceed a specified sum; the other class, including notes payable elsewhere, or mentioning no place of payment, to an indefinite amount. There is no evidence of an understanding between the plaintiff and Peets, when the note in question was signed by the plaintiff, in regard to its coming under the agreement, and forming part of the amount to which the plaintiff was to sign or indorse for Peets, if such evidence would have been admissible; and in the absence of evidence on that subject, this note must be deemed additional to the notes the plaintiff had agreed to sign or indorse; leaving the plaintiff bound to sign or indorse notes payable at the banks named, to the amount agreed upon, irrespective of the note in suit. If the plaintiff had signed or indorsed notes for Peets, of the description and to the amount specified in the agreement as recited, in addition to the present note, it cannot be doubted that the mortgage would have been available to him as security for his liability on all. It follows, therefore, that this note belongs to the second class of notes provided for by the mortgage; and that the mortgage in reference to this note must be regarded and treated precisely as if the plaintiff was indemnified only as to the second class of notes, by the mortgage.

Looking at the case in this aspect, the question arises, whether the mortgage, as to the note in suit, is entitled to priority under the recording acts, as against the defendant Bridges, a junior mortgagee in good faith. I think, under the decisions, it is not. The defect in the mortgage as con-

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structive notice, under those acts, is that no limit is fixed to the extent of liability in regard to the second class of notes ; that it may be increased indefinitely ; and that it affords a dangerous facility for a fraudulent substitution of notes ; in short, that to allow such a mortgage to be valid, would effectually defeat the policy of the recording laws. In *Pettibone v. Griswold*, (4 Conn. 158,) a mortgage with a condition to secure a note particularly described, and “all other notes the said grantee might indorse for, or give for, said Griswold, at the bank or elsewhere, and all the receipts said Pettibone, deceased, might hold against said Griswold,” was as to the “other notes,” &c., void as against a junior incumbrancer, for substantially the reasons above stated. This doctrine is approved in numerous cases, and supported by the most convincing reasoning, which it is unnecessary here to repeat. (*Truscott v. King*, 2 Seld. 147, 161, 166, and cases therein cited. Also *Youngs v. Wilson*, 24 Barb. 510, and cases there cited.)

My conclusion is, that the judgment should be reversed, and a new trial granted, with costs to abide the event.

[CAYUGA GENERAL TERM, June 6, 1859. T. R. Strong, Smith and Johnson, Justices.]

THE NEW YORK LIFE INSURANCE AND TRUST COMPANY
vs. COVERT and others.

A presumption of payment is not like an actual payment, which satisfies the debt as to all the debtors ; it operates as a payment only in favor of the party entitled to the benefit of the presumption.

The presumption of payment of a mortgage, arising from the lapse of over twenty years from the time when the mortgage money became due, will not be repelled by proof of a payment made by the mortgagor after he has sold and conveyed the mortgaged premises to another person ; so far as the purchaser, and those claiming under him, are concerned.

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Where a party relies upon the presumption of payment, arising from lapse of time, the proper mode of making the defense is to allege payment, in his answer.

THIS was an appeal from a judgment entered at a special term. The action was for the foreclosure of a mortgage, given May 1, 1829, by William Cornell and wife to Daniel A. Amerman, and assigned by Amerman to John De Mott, May 7, 1831, and by the latter to the plaintiffs in August, 1832. It was assigned to the plaintiffs as collateral security to a bond for \$10,000, given by De Mott to them. By sundry conveyances the mortgaged premises were now owned by the defendants, and they only were made parties to the suit. The mortgage, by its terms, was due and payable April 1, 1831. The last payment made by Cornell, the mortgagor, or any one in possession of the equity of redemption, was \$420, on the 26th of May, 1830. Cornell conveyed the premises to B. Clay in 1837, and quit possession in 1838. After he had ceased to have any interest in the premises, he made a payment of \$100 upon the mortgage on the 5th of November, 1841, and another of \$200 on the 9th of December, 1841. The referee, to whom the cause was referred, found that the sum of \$1716.42 was due to the plaintiffs upon the mortgage, and the court made a decree for the foreclosure of the mortgage and sale of the premises. From which decree the defendants appealed.

Smith & Barto, for the appellants. I. The defendants claim that, except as against Cornell, the mortgagor, who has made payments, the presumption of payment is absolute, and this mortgage cannot be collected from the land. The only remedy is by action on the bond, which Cornell has kept in life. (2 R. S. 301, § 48. *Van Keuren v. Parmelee*, 2 Com. 523.) After Cornell had sold the equity of redemption, he could do nothing whatever to affect it. In *Watson v. Spence* (20 Wend. 263.) it was held that the foreclosure of a mortgage against the mortgagor alone, after alienation by him,

was a nullity. He can do nothing which will affect the rights of the party holding the equity of redemption. (*See also 2 Powell on Mortgages*, 250, *Rands' ed.*) These defendants have never done any thing required by the statute to keep the mortgage alive as against them. Cornell's payments were not made with the knowledge, privity or consent of the defendants, and therefore only kept alive his bond debt.

II. The revised statutes have introduced no new principle. They have only made twenty years the time when the presumption of payment shall in all cases prevail. Before, it might be longer or shorter than that time, according to circumstances. The cases before the revision are therefore of as much authority on the main question as those decided since. In the case of *Jackson v. Wood*, (12 *John.* 242,) the presumption of payment was allowed to prevail. There the presumption was attempted to be rebutted, by showing that each of the owners of the equity of redemption had acknowledged the mortgage to be a subsisting incumbrance. That case proceeds upon the theory that the acknowledgments to rebut the presumption of payment must be made by the owner of the equity of redemption. This is in harmony with the rule which allows the admissions of a party owning real estate to be given in evidence whilst he is the owner, but rejecting them the moment his title and possession have ceased. (*See also Giles v. Baremore*, 5 *John. Ch. Rep.* 545.) In the case of *Park v. Peck*, (1 *Paige*, 478,) the chancellor held the presumption rebutted, because Peck, the purchaser, frequently recognized the mortgage as an existing incumbrance. In the case of *Heyer v. Pruyn*, (7 *id.* 465,) a subsequent purchaser was held bound by the notice to, and acknowledgment by, a prior owner of the equity of redemption while he was owner, or about to become so; and the inference is very strong, that to make such acknowledgment binding, it must be by a party who, for the time being, has the right to redeem. In that case, at page 470, the chancellor says: "That where the per-

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sonal liability of the mortgagor has been separated from the ownership of the land, a recovery against the mortgagor on his bond, after such separation, would not estop the owner of the land from showing that the mortgage was paid." Cornell's payments, in 1841, could have no greater effect than a recovery against him on his bond. In the case of *Hughes v. Edwards*, (9 *Wheaton*, 490,) it was held that the purchaser of the equity of redemption, with notice under the registry act, was bound by the written acknowledgments of the mortgagor; but the case does not show distinctly whether the conveyance of the equity of redemption was before or after the acknowledgments. The inference, however, is that the acknowledgments preceded the conveyance, being in the form of letters admitting the existence of the mortgage, and promising to make remittances. In *Dunham v. Minard*, (4 *Paige*, 443,) the chancellor speaks of the owner of the equity of redemption as holding adversely to the mortgage, when he has done nothing to recognize it. In *Richmond v. Ackin*, (25 *Verm. Rep.*) it was held that where the owner of a part of the equity of redemption made an acknowledgment of the mortgage, and subsequently became the purchaser of the whole, and then sold the whole to the defendant, the defendant was bound by the acknowledgment. The whole reasoning of the court proceeds upon the assumption that the acknowledgment must be made while the party making it owns the whole or a part of the equity of redemption. It must be made by a party bound to remove the burden of the mortgage, and whilst so bound.

III. The right is also barred by the provisions of the statute, with regard to the time within which an action must be brought, after a right of entry has accrued. (2 *R. S.* 293, § 7. 2 *John. Ch. Rep.* 135.)

IV. This is a statute of presumptions, not of limitations, and it was not necessary to plead it in bar. (*Giles v. Baremore*, 5 *John. Ch. Rep.* 545.)

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A. T. Knox, for the respondent. I. The mortgage and bond were due April 1, 1831. The last payment made on them by Cornell, the mortgagor, was December 9, 1841. The action was commenced in 1853. So twenty years have not yet elapsed since the last payment.

II. The answer of the defendants does not take the objection that the action was not commenced within the time limited by statute. Such objection can be taken by answer only. (*Code*, § 74. *Lefferts v. Hollister*, 10 *How.* 383.)

III. The "exception" made by the defendants admits that the payment made by Cornell might revive the bond debt against him. A mortgage given with a bond is merely collateral to the latter; and when the statute has not run against the bond, it is absurd to say that it has against the mortgage. Besides, Covert and the other defendant (Cornell is not a party) are entire strangers to the bond and mortgage, and are made parties only because they have an interest in the premises sought to be foreclosed, subsequent to the execution of the mortgage. Hence, they are not in a condition to raise the objection that the statute has run.

IV. As to the question of fact found by the referee, we say: The proof is conclusive, parol and documentary, that the mortgage and bond were assigned to the plaintiffs with the knowledge of Cornell, the mortgagor, before the pretended payment by him to De Mott.

By the Court, T. R. STRONG, J. The revised statutes, (vol. 2, page 301, sec. 48,) provide, that "after the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument, for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period." This provision is applicable to the present case; as the right of action on the mortgage had accrued, and existed, when the code, in reference to

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the time of commencing actions, went into operation. (*Code*, § 73.)

The mortgage in question was executed by Cornell to Amerman on the 1st of May, 1829, and was payable in two equal annual instalments, with interest. Cornell executed a bond to Amerman, in connection with the mortgage. Amerman assigned the bond and mortgage to De Mott, on or before the 7th of May, 1831; and the latter, on the 1st of August, 1832, assigned the same to the plaintiffs. In 1837, Cornell conveyed the mortgaged premises to Clay, who conveyed the same to Cornelius V. Covert on the 31st of March, 1838; and the latter afterwards conveyed 98 acres of the premises to the defendant Sniffin, and to the defendant Isaac Covert about two acres. This action, the object of which is the foreclosure of the mortgage and the sale of the mortgaged premises, was commenced in August, 1853, the owners of the equity of redemption at that time, with their wives, only, being made parties defendants. The defendants, in their answer, set up as a defense, in substance, the payment of the bond and mortgage by Cornell to the plaintiffs. It is proved, that in addition to other payments previously, there was paid by Cornell to Amerman, on the 26th of May, 1830, \$420; and that Cornell paid to the plaintiffs, November 5th, 1841, \$100, and December 9th, the same year, \$200.

More than twenty-three years had elapsed after the last payment by Cornell, while he owned the equity of redemption, before the commencement of the action; and unless the payments made by him in November and December, 1841, after he had parted with his entire interest in the premises, repel the presumption of payment of the mortgage debt, not only as to him, but as to persons claiming under him, through a prior conveyance, the mortgage must, by the direction of the statute, be deemed paid and satisfied, and the defendants must prevail in the action.

It does not appear whether Cornell assumed to convey merely his equity of redemption, making the land primarily

liable for the payment of the incumbrance, or the entire title, undertaking himself to pay the mortgage ; if the former, after the conveyance, he was in equity, as obligor in the bond, a mere surety for the debt ; if the latter, the land was a mere security for the debt, and he was the principal debtor.

Such being the relation between Cornell and the defendants deriving title under him, it would seem to be inequitable and unjust to allow either, by any act or declaration, to affect the rights and interests of the others, in regard to the incumbrance, either by a written acknowledgment of the debt, or by part payment. If Cornell might thus bind the defendants, they might equally bind him in the same manner. Such an acknowledgment, or a partial payment, ought to be a waiver of the statute benefit, and renew the debt from that time, only as to the party making the acknowledgment or payment. There is no difficulty in allowing as to one party, under the statute, a presumption of payment, and refusing it to the others. A presumption of payment is not like an actual payment, which satisfies the debt as to all the debtors ; it operates as a payment only in favor of the party entitled to the benefit of the presumption. It may apply to the bond and not to the mortgage, or to the mortgage and not to the bond, according to circumstances. (*Heyer v. Pruyn*, 7 *Paige*, 465. *Park v. Peck*, 1 *id.* 477. *Jackson v. Wood*, 12 *John.* 242.)

The rule is now settled, that an acknowledgment and promise to pay a debt, or a payment, made by one of several partners after dissolution, or one of several joint and several debtors, will not revive or renew the debt against the others, in reference to the statute of limitations. (*Van Keuren v. Parmelee*, 2 *Com.* 524. *Shoemaker v. Benedict*, 1 *Kernan*, 176. *Winchell, ex'r, v. Hicks*, 18 *N. Y. Rep.* 558.) Neither is authorized, from the mere fact of being liable for the debt, to prevent the running of the statute, or take the debt out of the statute as to the other debtors. Want of authority is the ground on which the rule rests.

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The same principle, I think, embraces the present case. Proof of payment of part, or of a written acknowledgment of the right of action, will repel the presumption of extinguishment by payment, only as to the party who has thereby recognized the existence of, and his obligation and willingness to pay, the debt. As to other parties, it will have no effect. This is the fair construction of the statute.

It was the proper mode of making a defense, under the statute in question, to allege payment. (*Henderson v. Henderson*, 3 Denio, 314. *Fellers v. See*, 2 Barb. S. C. R. 488. *Giles v. Baremore*, 5 John. Ch. 545. *Austin v. Tompkins*, 3 Sand. 22. *Pattison v. Taylor*, 8 Barb. 250.)

The judgment must be reversed, and a new trial granted; costs to abide the event.

CAYUGA GENERAL TERM, JUNE 6, 1859. *T. R. Strong, E. Darwin Smith and Johnson*, Justices.]

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STARIN vs. THE TOWN OF GENOA.

The constitutionality of the act of April 16, 1852, "to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a rail road or rail roads from Lake Ontario to the New York and Erie, or Cayuga and Susquehanna rail road," must be deemed settled by the recent decisions.

Authority being given to the towns, by the statute, to issue bonds, instruments appearing on their face to have been executed in pursuance of that authority, and so far as appears, in accordance with it, are valid in the hands of, and may be enforced by, *bona fide* holders thereof; whether the prerequisites prescribed by the statute to the issuing of the bonds, beyond the organization of a rail road company, &c., and the filing in the county clerk's office of the assent of resident tax-payers, with the affidavit attached, as specified in the statute, were complied with or not.

Instruments without seal, issued by a town, which contain an acknowledgment that, in pursuance of the statute, and for the purpose of aiding in the

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construction of the rail road therein specified, the town owes, and a promise by the town to pay to ---, or bearer, \$1000, with interest at the rate of seven per cent, payable as therein mentioned, are negotiable; although the statute does not prescribe the form of the bonds, nor expressly provide whether they shall or shall not be negotiable.

The omission of a seal is not a fatal objection to instruments thus executed by a town, as being instruments not warranted by the law.

Although the statute specifies a "bond or bonds" as the instruments which it shall be lawful for the towns to execute, this is to be deemed as done with a view to the interests of the creditors only; and if they are willing to waive the proposed benefit and accept unsealed obligations, the towns cannot object that such obligations were not authorized.

A PPEALS from orders made at a special term, ordering judgment for the defendant on demurrer to the complaint in each of the above actions. The complaint in the first suit alleged, that by an act of the legislature of the state of New York, entitled "an act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a rail road, or rail roads, from Lake Ontario to the New York and Erie, or Cayuga and Susquehanna rail road," passed April 16th, 1852, it was, among other things, made lawful for the supervisor and rail road commissioners of the town of Venice, in the county of Cayuga, to borrow, on the faith and credit of said town, such a sum of money as they might deem necessary, not to exceed \$25,000, for a term of time not exceeding twenty years, with such rate of interest as might be agreed upon, not exceeding seven per cent per annum, and to execute therefor, under their official signatures, a bond or bonds, on which the interest should be made payable annually, or semi-annually, during the term said money might be borrowed; and the principal and interest of which loan should be made payable in such sums, and at such times and place as should be agreed upon, and expressed in the bonds duly executed under the authority of said act. That all moneys borrowed under the authority of said act, should be paid over to the president and directors of such rail road company, then organized, or such company as might be organ-

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ized, according to the provisions of the general rail road law, passed April 2d, 1850, as might be expressed by the written assent of two thirds of the resident tax-payers of said town, to be expended by such president and directors in grading, constructing and maintaining a rail road, or rail roads, passing through the city of Auburn, and connecting Lake Ontario with the Susquehanna and Cayuga rail road, or the New York and Erie rail road ; provided that the said supervisor and commissioners should have no power to do any of the acts authorized by said act, until a rail road company had been duly organized, according to the requirements of the general rail road law, for the purpose of constructing the aforesaid described rail road, and the written assent of two thirds of the resident persons taxed in said town, as appearing on the assessment roll of such town, made next previous to the time such money might be borrowed, should have been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga county, together with the affidavit of such supervisor and commissioners, or any two of them attached to such a statement, to the effect that the persons whose written assent were thereto attached, and filed as aforesaid, comprised two thirds of all the resident tax-payers of said town, on its assessment roll, next previous thereto ; and in and by which said act it was further provided, that the said supervisor and commissioners, on obtaining and filing such assent as aforesaid, might subscribe for and take, in the name of and for such town, such a number of shares of the capital stock of such company as should or might be organized for the purpose of constructing the aforesaid described rail road, or rail roads, as would be equal to the amount of the bonds executed under the authority of said act. The complaint further alleged, that afterwards, to wit, on or about the 23d day of August, 1852, a rail road company was duly organized, according to the provisions of the general rail road law of the state of New York, passed April 2d, 1850, by the name of "The Lake Ontario, Auburn and New York Rail

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Road Company," for the purpose of constructing and maintaining a rail road, passing through the city of Auburn, and connecting Lake Ontario with the Cayuga and Susquehanna rail road; and which said company, immediately upon its organization as aforesaid, proceeded to the construction of such rail road, and was engaged in such construction at the time of the execution and issuing by the supervisor and rail road commissioners of said town of Venice, as hereinafter mentioned, of the bonds hereinafter mentioned. That by virtue of the power conferred by said act upon the supervisor and rail road commissioners of said town, afterwards, to wit, on or about the 2d day of March, 1853, Calvin King, who was then the supervisor of said town of Venice, duly elected and qualified, and acting as such, and Jonas Wood and Isaac Smith, who were then the rail road commissioners of said town, duly elected, qualified and acting as such, pursuant to the provision of said act of the legislature, passed April 16th, 1852, duly made and executed, under their official signatures, twenty-five bonds of said town of Venice, each of which said bonds was an exact duplicate or counterpart of every other, except that each was differently numbered from every other, the numbers thereof being from one to twenty-five, both inclusive, and each of which bonds was executed by the said supervisor and rail road commissioners, under their official signatures, and in and by each of which said bonds the said town of Venice, pursuant to said act of the legislature, for the purpose of aiding the construction of the said "The Lake Ontario, Auburn and New York rail road," promised to pay to ----, or bearer, the sum of \$1000, with interest, at the rate of seven per cent, payable semi-annually, on the 1st days of January and July in each year, on surrender of the coupons thereto attached, at the Bank of the State of New York, in the city of New York, the principal to be reimbursable at the same place, at the expiration of twenty years from the 1st day of January, 1853, and to each of which said bonds were attached coupons, for the respective installments of interest,

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as the same should become due and payable, according to the terms of said bond ; one of which said bonds being annexed to the complaint, marked "schedule A." That after the execution of said bonds, and on or about the 15th day of August, 1853, the said Calvin King, as such supervisor, and the said Jonas Wood and Isaac Smith, as such rail road commissioners, (the said Calvin King then being and acting as such supervisor, and the said Jonas Wood and Isaac Smith then being and acting as such commissioners,) under and in accordance with said act of the legislature, and by virtue of the authority thereby conferred, subscribed for and took, in the name of and for said town of Venice, 500 shares of the capital stock of said company, of the par value of \$50 each share, making the aggregate par value thereof equal to the amount of the bonds theretofore executed under the authority of said act. That afterwards, and on or about the 10th day of October, 1853, the said Calvin King, as such supervisor, and the said Jonas Wood and Isaac Smith, as such commissioners, having as aforesaid subscribed for and taken such stock of said company to the amount of 500 shares, of the par value of \$50 each, and having in their possession the said twenty-five bonds so executed as aforesaid, they, the then supervisor and commissioners of said town, sold, assigned, transferred and set over said bonds, and all of them, to the said "The Lake Ontario, Auburn and New York Rail Road Company," in payment of the amount of such subscriptions as aforesaid, and the said "The Lake Ontario, Auburn and New York Rail Road Company," in consideration thereof, issued and delivered to the said supervisor and commissioners of said town 500 shares of full stock of the capital stock of said company, of the par value of \$50 each share, in the name of and for said town of Venice, and took and received said bonds in full payment therefor ; and the said town of Venice actually received, and ever after owned and held, and still owns and holds the said stock, which was paid for by said town, wholly, by the delivery of said bonds in payment as aforesaid, and

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not otherwise. That previous to the execution and delivery of said bonds as aforesaid, or of any of them, the written assent of two thirds of the resident persons taxed in said town, as appearing on the assessment roll of said town next previous to the time of the sale of said bonds, was obtained by the said supervisor and commissioners of said town, and filed in the clerk's office of Cayuga county, (such assent expressing the Lake Ontario, Auburn and New York Rail Road Company as the company to which all moneys borrowed under said act should be paid,) together with the affidavit of the said supervisor and commissioners attached to the statement of such assent, to the effect that the persons whose written assent was thereto attached and filed as aforesaid, composed two thirds of all the resident tax-payers of said town, on its assessment roll, next previous thereto, as required by the provisions of said act; and duplicate copies of said bonds were also, at or about the time of the transfer of said bonds as aforesaid, duly filed by the said supervisor in the said clerk's office of Cayuga county. And the plaintiff further alleged that he had become, and now was, the *bona fide* holder and owner, by the purchase thereof, for a valuable consideration, of eleven of said bonds, being Nos. 8, 9, 10, 11, 12, 13, 14, 22 and 23, with the interest coupons, for the installments of interest remaining unpaid thereon, and that he was entitled to demand, have and receive the interest moneys now due and owing and remaining unpaid thereon; and that the interest on each of said bonds, from the 1st day of July, 1855, remains wholly due and unpaid, being the respective semi-annual installments which became due on the 1st days of January and July, in each of the years 1856, 1857 and 1858, and amounting upon each of said bonds to the sum of \$210. And the plaintiff further alleged that the payment of each of said installments, upon each of said bonds, had been duly demanded, on behalf of him, the said plaintiff, as the holder and owner of said bonds, as the same respectively became due and payable, and the respective coupons therefor offered to be surrendered; but the same had not, nor

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had any part thereof been paid, but payment thereof had at all times been refused. And that the defendant had entirely neglected to provide money at the Bank of the State of New York, in the city of New York, for the purpose of paying the installments of interest upon said bonds, or any of them, as the same or any of them became due and payable, and that no moneys had at any time been provided at said bank for that purpose. Wherefore, the plaintiff demanded judgment against the defendant for the sum of \$2310, with interest on the sum of \$385 from the 1st day of January, 1856, and on the further sum of \$385 from the 1st day of July, 1856, and on the further sum of \$385 from the 1st day of January, 1857, and on the further sum of \$385 from the 1st day of July, 1857, and on the further sum of \$385 from the 1st day of January, 1858, and on the further sum of \$385 from the 1st day of July, 1858, with the costs and disbursements of this action.

“Schedule A,” annexed to the complaint, contained the following copy of one of the bonds :

“State of New York.

No. 8.	County of Cayuga.	\$1000.
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Seven per cent loan, not exceeding \$25,000. Be it known, that the town of Venice, in the county of Cayuga and state of New York, in pursuance of an act of the legislature of the said state, entitled an act to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a rail road, or rail roads, from Lake Ontario to the New York and Erie, or Cayuga and Susquehanna rail road, passed April 16, 1852, and for the purpose of aiding the construction of the Lake Ontario, Auburn and New York rail road, owes, and promises to pay, to ----- or bearer, one thousand dollars with interest, at the rate of seven per cent, payable semi-annually, on the first days of January and July, in each year, on surrender of the coupons hereto attached, at the Bank of the State of New York, in the city of New York, the principal

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to be reimbursable at the same place, at the expiration of twenty years from the first day of January, 1853.

In testimony whereof, the supervisor and commissioners of the town of Venice have, pursuant to the provisions of the act aforesaid, and the written assent of two-thirds of the resident tax-payers of said town, obtained and filed in the office of the clerk of the county of Cayuga, hereunto subscribed their names, this 26th day of February, A. D. 1853.

(Signed) CALVIN KING, Supervisor.
JONAS WOOD, }
ISAAC SMITH, } Commissioners.

Cayuga County Clerk's Office, ss.

I, Edwin B. Marvin, clerk of the county of Cayuga, hereby certify that a paper purporting to be the written assent of two thirds of the resident tax-payers of the town of Venice, with the affidavit required by section one of the act referred to by its title in the foregoing bond, has been filed in this office.

Dated Auburn, May 16, 1853.

(Signed) E. B. MARVIN, Clerk of Cayuga county."

To this complaint the defendant demurred, and assigned the following causes of demurrer :

"That said complaint does not state facts sufficient to constitute a cause of action herein against the said defendant. That the act mentioned and referred to in said complaint, was and is unconstitutional and void. That said complaint does not show that any money was ever borrowed, under and in pursuance of said act. That if borrowed, it was not borrowed at the time or in the manner required by said act. That said complaint does not show or state that the supervisor or assessors, or any other officer of said town, ever met to agree, resolve, move or determine, to borrow any money for the purposes contemplated by said act, or to 'deem' or adjudge that \$25,000, or any other sum of money, was necessary for the purposes and objects contemplated by said act. That said complaint does not show that any bonds were ever issued in pursuance of said act, or otherwise, or according to the provisions and

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requirements of said acts, and that the instruments mentioned and referred to in said complaint and therein denominated bonds, are void and of no effect upon their face. That it is not stated or averred in said complaint, that the assent mentioned and referred to in said complaint, was ever obtained or filed by any supervisor, assessor or other officer of said town of Venice. Nor does it appear that said assent was the written assent of two thirds of the resident persons taxed in said town, as appeared on the assessment roll of said town, next previous to the time said money was borrowed; but on the contrary thereof, it appears that it was not such an assent of the taxpayers of said town as required by said act. That it does not appear by said complaint, that the subscription so made by the supervisor and assessors of said town, to the capital stock of said rail road company, in said complaint mentioned, was a valid or legal subscription, or binding upon said town in any way whatsoever."

The pleadings in the second suit were similar to those in the first.

The court, at special term, ordered judgment for the defendant, in each action, with leave to the plaintiff to amend his complaint within twenty days. The defendants severally appealed.

Wright & Pomeroy, for the plaintiff.

C. A. Warden, for the defendant.

By the Court, T. R. STRONG, J. The constitutionality of the statute under which the instruments in question, called bonds, were issued, must be deemed settled by recent decisions. (*The Bank of Rome v. The Village of Rome*, 18 N. Y. R. 38. *Clarke v. The City of Rochester*, 24 Barb. 446. *Benson v. Mayor &c. of Albany*, Id. 248. *Grant v. Courter*, Id. 232.)

The plaintiffs are bona fide purchasers of the so called bonds, for a valuable consideration, and if the statute authorized instruments of such a nature, and they are negotiable, like bills

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of exchange and other commercial paper, there can be no doubt that the plaintiffs are entitled to prevail in these actions. Authority being given to the towns by the statute to issue bonds, and the instruments appearing on their face to have been executed in pursuance of that authority, and so far as appears in accordance with it—whether the prerequisites prescribed by the statute to the issuing of the bonds, beyond the organization of a rail road company, &c., and the filing in the county clerk's office of the assent of resident tax-payers, with the affidavit attached as specified in the statute, were complied with or not—the bonds are valid in the hands of and may be enforced by the plaintiffs as bona fide holders. This doctrine is fully sustained by the case of *The Farmers' and Mechanics' Bank of Kent County v. The Butchers' and Drover's Bank*, (16 N. Y. R. 125,) and the cases therein cited.

The utmost that purchasers of the bonds were required to ascertain was, that such a rail road company had been organized, and the assent and affidavit provided for by the statute filed; that there was apparent authority to execute the bonds; and those things only were necessary to such apparent authority. Full compliance with those conditions to the existence of the power, before the making of the bonds, appears by the complaint.

The bonds express an acknowledgment that in pursuance of the statute, and for the purpose of aiding in the construction of the rail road specified in the bonds, the towns owe, and a promise by them to pay, to ---- or bearer \$1000, with interest at the rate of seven per cent, payable as therein mentioned. They are without seal, and are in terms negotiable; and they contain every requisite to negotiability in the case of an ordinary instrument for the payment of money. They are a written promise by one to another for the payment of money absolutely. The statute does not prescribe the form of the bonds, nor expressly provide whether they may or shall not be negotiable; but I think there is in its language the purpose for which the bonds were to be used, and the general

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understanding and practice of the community in regard to similar securities, evidence that the legislature contemplated, in respect to them, the element of negotiability. In the 5th section of the statute, provision is made for the payment of dividends on stock to the "holders of the aforesaid bonds;" and in the 7th section direction is given in regard to the disposition of the proceeds of a sale of shares of stock, if the "owner or owners of said bonds" will not accept the same. This language implies transferability, and is especially appropriate in reference to negotiable paper. Again, the bonds were to be used for borrowing money, several bonds were to be issued to several individuals, and, in the usual course of business, negotiable securities would be required by lenders. Further, the bonds belong to a class of securities which have been generally understood to be, and have been treated as negotiable. They are, in popular language, rail road bonds, of which a vast number, of immense aggregate amount, have, within the last twenty years, been issued both in this country and abroad, and which have been in daily circulation from one to another by mere delivery. Aside from the authority of adjudged cases, I should not doubt the negotiability of the bonds in question; but the decisions are conclusive on the subject. In the *Bank of Rome v. The Village of Rome*, a case in the court of appeals of this state, decided in March last, bonds of the village corporation, although under the corporate seal, issued under the authority of a statute for the payment for stock in a rail road, were held to be negotiable, although the statute is silent on the subject. Comstock, J., says, "The bonds were payable to bearer, and, although under the corporate seal of the village, they were negotiable instruments in such a sense as would except them, in the hands of a bona fide holder, from a defense which might be available against the rail road company." (*State of Illinois v. Delafield*, 8 Paige, 527. *Same case on appeal*, 2 Hill, 159, 177. *Mechanics' Bank v. New Haven R. R. Co.*, 3 Kern. 625, 627. *Fisher v. Morris Canal Co.*, 3 Am. Law Reg. 423. See also Gor-

gier v. Mieville, 3 *Barn. & Cress.* 45; 10 *Eng. Com. Law*, 16; 2 *Parsons on Con.* 240.)

The question remains, whether the bonds are in conformity to the act in respect to the securities authorized. The statute specifies "a bond or bonds" as the instruments which it shall be lawful for the towns to execute. In strictness, the term bond imports a sealed obligation; and the securities in question are not bonds, for the want of a seal. But it is not probable that the legislature used the word, in this statute, in that confined sense, or as signifying more than an instrument substantially in the form of a bond, without regard to a seal. The principal object in view in regard to the security was, that it should be a promise by the town to pay, which would be acceptable to the lenders. It is not perceived that a seal would be of any benefit to the towns; it would benefit only the lenders. A technical bond would be a higher security than an unsealed promise to pay, and more valuable, in some respects, to a creditor, and to the same extent less desirable to a debtor. Specifying bonds instead of notes, must therefore have been with a view to the interests of the creditors only; and if they were willing to waive the proposed benefit and accept unsealed obligations, it does not seem to be just that the towns should be permitted to object that those obligations were not authorized. This view of the intention of the legislature in the use of the term bond is confirmed by the well known fact, of which we may take notice as part of the history of the state, that towns do not ordinarily have occasion for or possess a corporate seal, their corporate capacity being very limited. Construing the statute according to its spirit, its obvious substantial meaning, I cannot believe that the omission of a seal is a fatal objection to the bonds, as being instruments not warranted by the law.

I think, therefore, that the so called bonds are valid securities against the towns, in the hands of the plaintiffs as bona fide holders, and for that reason that the judgments at special

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term should be reversed, and judgments ordered for the plaintiffs on the demurrers, with leave to the defendants to answer on payment of costs.

[CAYUGA GENERAL TERM, June 6, 1859. *T. R. Strong, E. Darwin Smith and Johnson, Justices.*]

MALLORY vs. LORD.

On the 22d of April, 1846, the plaintiff agreed to sell to the defendant a canal boat and a pair of horses, at the price of \$800, payable by installments of \$40 per trip; the boat to be employed in the business of the plaintiff, and the boat and horses to remain the property of the plaintiff, until the price should be paid. In pursuance of this agreement, the defendant made four trips with the boat, paying to the plaintiff \$40 each trip. About the 1st of September he abandoned the boat and the employment of the plaintiff, retaining the horses, and the plaintiff resumed the possession of the boat in October thereafter, and subsequently sold the same to C. for \$550, without notice to the defendant. *Held* that the contract was put an end to, by the voluntary act of the parties, except so far as it affected or controlled their rights in respect to the question of damages.

Held also, that treating the contract as broken, by the defendant, the plaintiff was entitled to recover such damages as resulted from the breach. And that, assuming the value of the boat and horses to have been the sum fixed as the price thereof, in the contract, the plaintiff's damages would be the difference or deterioration in value of the boat between the time when the defendant took possession, and the time when the plaintiff resumed the possession thereof; the value of the horses retained by the defendant; and any other loss or injury sustained by the plaintiff from the neglect or refusal of the defendant to carry his freight, with interest thereon, deducting the amount paid by the defendant upon the contract.

Held further, that the plaintiff, after having resumed possession of the property, had no right to sell the same at private sale, without notice to the defendant. And that it was error for the judge to charge the jury that the plaintiff was entitled to recover the \$800, the price fixed in the contract, and interest, after deducting the sum of \$550 for which he sold the boat to C., and \$160, the amount paid by the defendant, on the contract.

THIS action was brought to recover damages of the defendant for the breach of an agreement between the parties,

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made on the 22d of April, 1856, whereby the plaintiff agreed to sell to the defendant a canal boat and pair of horses at the price of \$800, payable by installments of \$40 per trip, the boat to be employed in the business of the plaintiff, and it and the horses to remain the property of the plaintiff until the price should be fully paid. The complaint alleged the failure of the defendant to perform, and an abandonment by him of the boat, and that the plaintiff was obliged to receive the same in an injured condition, to his damage, &c. The answer, first, denied the complaint, and second, alleged that the defendant was ready to perform, and did perform, until the plaintiff took the boat and thereby prevented a further performance, &c. It appeared that four trips were made with the boat in the season of 1856, pursuant to the agreement, and \$40 was paid to the plaintiff each trip, according to the terms thereof. The first two trips were made by the defendant himself, and the other two by Marvin Lord, by arrangement with and consent of the plaintiff. On his return, in September, after making the fourth trip, Marvin Lord was taken violently ill, and thereby compelled to leave the boat at Havana, (in charge of a person there,) about 20 miles from Corning; the water in the canal being too low to run the boat to Corning at the time. The plaintiff soon after (in October) took the boat into his possession and locked it up at Gibson, near Corning. Marvin Lord soon after recovered his health and endeavored to get the boat, to run it pursuant to the agreement, but was unable to get possession—the plaintiff and his agents refusing to let him or the defendant have it. Neither the defendant nor Marvin ever had any possession or control of the boat. The canal navigation that season closed in December. The plaintiff kept the boat in his possession until about the 25th of April, 1857, when he sold and delivered it and a team to Joseph Comfort, for \$850, at private sale, without notice to the defendant. At the close of the plaintiff's testimony the defendant moved for a nonsuit, upon the grounds, 1st. That the plaintiff had failed

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to make out a cause of action. 2d. That there was an entire failure of proof to support the complaint. 3d. That there was no breach of contract, on the part of the defendant, shown. 4th. That the plaintiff, by taking the boat into his possession, had committed a breach of the contract on his part. 5th. There was no proof that the plaintiff kept and performed the contract on his part. 6th. That the plaintiff, by taking the boat into his possession, and retaining possession thereof, and by his conduct in respect thereto, put an end to the contract, and could not recover thereon. 7th. That the plaintiff had rescinded the contract by his own act. 8th. That there was no sum due and payable upon the contract at the time of the commencement of this action. 9th. That no damages had been shown, to authorize the jury to find a verdict for the plaintiff. The court denied the motion. It was claimed by the plaintiff's counsel, on the trial, that the boat was sold to Comfort for \$550.

The court charged the jury that if they found for the plaintiff he was entitled to recover \$800, (the sum mentioned in the contract sued on,) and interest from date of contract, less the sum of \$550, (for which the plaintiff sold the boat to Comfort,) to be applied as of the time of such sale to Comfort; also less the four payments of \$40 each (\$160) made on the contract, to be applied as of the time they were made, respectively. To which charge the counsel for the defendant excepted. The jury found a verdict for the plaintiff for \$127. From the judgment entered upon such verdict the defendant appealed. *

Geo. B. Bradley, for the appellant. I. The plaintiff was not entitled to recover, and the motion for a nonsuit ought to have been granted. (1.) The agreement set forth in the complaint could not be the basis of an action by the plaintiff for any purpose, except to recover the purchase money that should become due thereon; even a breach thereof by the defendant would not authorize an action thereon for any other purpose. A

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failure by the defendant to perform service under it would be but a failure to pay the purchase price. But, in this case, it appears by the evidence that there was no sum due or payable on the agreement, at the time of the commencement of the action. (2.) In case of a breach of the agreement by the defendant, the plaintiff had only one of two remedies ; one, (in case of breach so as to authorize it,) would be to treat the sale to the defendant as absolute, and bring his action for the price, and the other, to retake the property and thereby rescind the agreement. The plaintiff having resorted to the latter remedy, thereby rescinded the agreement, and necessarily deprived himself of the former. He cannot avail himself of both. (*Lloyd v. Brewster*, 4 *Paige*, 537. *Junkins v. Simpson*, 2 *Shepley*, 364. *Hill v. Greene*, 4 *Pick.* 114. *Kettletas v. Fleet*, *Anth. N. P.* 36.) (3.) By the terms of the agreement, and in fact, the title to the property remained in the plaintiff, and the defendant was not at liberty to treat the agreement as any thing more than one for service—he being a mere servant of the plaintiff—until the agreement was fully performed on his part. (*Tuthill v. Wheeler*, 6 *Barb.* 362, 5. *The Lehigh Coal Co. v. Field*, 8 *Watts & Serg.* 232. *Strong v. Taylor*, 2 *Hill*, 326.) And the plaintiff, by taking and selling the boat, elected to so treat the agreement, and so took and sold it as owner. But upon the trial the plaintiff did not, and could not, show any damages, which in that aspect could be the basis of a recovery. He certainly could not legally recover the price of the property as damages for loss of service. (4.) The plaintiff having delivered the property to the defendant, under the agreement, retaining the title thereto, afterwards voluntarily elected to take, and did without the consent of the defendant take the boat into his possession, retain and sell it to another party. It must be held that he took the boat as owner, and thereby rescinded the agreement, and he has no right of action thereon. (*Junkins v. Simpson*, 2 *Shep.* 364. *Gary v. Hill*, 11 *John.* 441. *Raymond v. Bearnard*, 12 *id.* 274. *Winter v. Livingston*, 13 *id.* 54.) After having taken

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and sold the boat as owner thereof, the plaintiff could not upon any legal principle recover the price of the property, of the defendant. Such recovery could only be had upon the assumption that the title to the property had passed, or would thereby pass, to the defendant. But the plaintiff having retaken the boat and necessarily prevented the defendant from having or taking title, is *estopped* from claiming a right to recover the price. (*In re Humbertson*, 1 *De Gex*, 262. *Dubois v. Del. & H. Canal Co.*, 4 *Wend.* 285.) (5.) The plaintiff failed to show any breach of the agreement on the part of the defendant. The illness of Marvin Lord necessarily compelled him to temporarily cease running the boat, which afforded an excuse for non-performance of service at that time. There is no fault on the part of the defendant, claimed. And there is no proof whatever that the defendant or Marvin abandoned the boat, but the contrary appears. Marvin left the boat, for the time being, in charge of another. The defendant had no knowledge of the misfortune which compelled Marvin to leave the boat. (6.) The plaintiff, by taking and retaining the boat, committed a breach of the agreement, and the defendant could not be required in the spring following to retake the boat and run it under the contract, and was justified in then stating that he was not going to take and run the boat, for the reason then given by him. He was at liberty to treat the agreement as rescinded. It seems he did, and offered to return the horses to the plaintiff, who refused to receive them. (7.) There was a failure of proof to support the complaint. The action, as appears thereby, was based upon the contract, alleging as a reason for recovery, that the defendant abandoned the boat and that the plaintiff was obliged to lose the use thereof, and receive the same greatly injured, &c. There is no proof, or facts, which authorize a recovery on any such basis. (8.) No damages whatever were shown, which could be the basis of a recovery.

II. The court erred in the charge to the jury, and the defendant's exception thereto was well taken. (1.) By this charge

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the jury in effect were instructed that the measure of damages was the contract price for the property, deducting the amount paid thereon, (the amount for which the plaintiff sold the boat to Comfort treated as so much paid and applied on the agreement.) In view of the facts that the title to the boat remained in the plaintiff, and that the plaintiff, after having delivered it to the defendant, voluntarily took and sold it, a recovery could not, upon any legal principle, be based upon the agreement price as the measure of damages. (2.) It is only where title has passed from the vendor to the vendee, and the property has been left in possession of the vendor as bailee having a lien for the price, that the vendor is at liberty to assume the character of agent or trustee of the vendee in respect to the property sold, so as to authorize him to sell the property to a third party, apply the proceeds upon the price, and bring an action against the vendee for the deficiency. (*Sands v. Taylor*, 5 John. 395. *Laird v. Pim*, 7 M. & W. 474, 478. *Dunlop v. Grote*, 2 C. & Kir. 153.) That is allowed upon the principle that the vendee has the title, the vendor having a lien for the price and being bailee from necessity. But where the title has not passed and the agreement of sale is executory merely, the law affords no such right to the vendor: his only remedy there is in case of breach by the vendee to bring his action to recover the difference between the market value and contract price as the measure of damages. (*McNaughten v. Cassaly*, 4 McLean, 530. *Laird v. Pim*, *supra*. *Dunlop v. Grote*, *sup*. *Sedgwick on Dam.* 283.) The implied condition in sales of property, that payment shall be made on delivery, does not operate to prevent the title passing to the vendee before payment and delivery; but title does pass to and vest in the vendee by the bargain; the right of the vendor being that of possession merely. (*Willis v. Willis*, 6 Dana, 49. *Wing v. Clark*, 24 Maine Rep. 366. *Pleasants v. Pendleton*, 6 Rand. 473.) But otherwise, where, by the agreement of sale, it is expressly provided that the property shall remain in the vendor until payment at a future day. (*Porter v. Pettengill*, 12 N. H. Rep.

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299. *Sargent v. Gile*, 8 *id.* 325. *Gambling v. Read*, 1 *Meigs*, 281. *Bigelow v. Huntley*, 8 *Verm. R.* 151. *Ayer v. Bartlett*, 9 *Pick.* 156. *Tibbits v. Towle*, 3 *Fairf. Rep.* 341. *Bennett v. Sims, Rice*, 421.) (3.) In this case, upon the assumed and undisputed facts, the plaintiff had no right to charge the defendant with the deficiency existing after selling the boat to Comfort. The title to the property never passed to the defendant, but continued in the plaintiff. The plaintiff delivered the property to the defendant under the agreement, and afterwards voluntarily retook the boat into his possession. The plaintiff had no right to take the boat, except as owner, and it must be held he took it as such; and after taking it as owner, he was not at liberty to insist that he held and sold it as trustee or agent of the defendant. The plaintiff had no lien on the boat for the price. Title and lien could not be held by the same person. No lien for price was reserved by the terms of the agreement. None was implied, the property being delivered to the defendant. The defendant did not deliver the boat into the plaintiff's possession to hold, or in any manner consent that the plaintiff should take, hold or sell it as his (the defendant's) property. The sale of the boat to Comfort was made by the plaintiff, for such price as he chose, without the direction or authority of the defendant, who had no knowledge or notice thereof. The charge and verdict, in respect to the measure of damages, are therefore without evidence or legal principle to support them.

III. The proof offered, to show the price for which the boat was sold by the plaintiff to Comfort, was incompetent.

IV. The defendant ought to have been permitted to show that the boat was in a better condition, and worth more, at the time the plaintiff took it, than when the agreement was made. Also the same in respect to the condition and value of the horses when the defendant offered to return them after the plaintiff had taken the boat.

G. F. Spencer, for the respondent. The only substantial questions in the case are, 1st. Whether the plaintiff, having taken possession of and sold the boat after the defendant had abandoned it and refused to perform the contract, can maintain the action; and, 2d. What is the rule of damages?

I. The contract, and the breach of it by the defendant, are established both by the evidence and the verdict of the jury.

II. The contract was an executory agreement of sale. By the terms of it, no title vested in the defendant, till a full performance by him. His possession gave him no present right of property, and he was not at liberty to use it, except in the manner specified in the contract. Upon his refusal or failure to perform, the right of possession reverted in the plaintiff; but his exercise of that right did not take away his remedy for the breach of the contract. The contract was not abandoned or rescinded. It was only broken. (*Barber v. Rose*, 5 *Hill*, 76.) The defendant enjoyed the fruits of the contract in the use of it one season, and the plaintiff in the payments which were made on it in the same time. In addition to this, the defendant, immediately after he claims a breach of the contract on the part of the plaintiff, sold one of the horses specified in the contract, and kept and used the other till the following spring. If the parties did not agree to rescind, the defendant, after this, could not exercise the right to rescind the contract. (2 *Parsons on Contracts*, 189, 192. *Dubois v. Del. & Hud. Canal Co.*, 4 *Wend.* 285. *Voorhees v. Earl*, 2 *Hill*, 288, 293. *Moyer v. Shoemaker*, 5 *Barb.* 319, 322.) The plaintiff did not consent to abandon or rescind the agreement; for in the spring following the abandonment of the boat by the defendant, he tendered the boat to the defendant, telling him that he still considered it as his.

III. In case of an executory contract for the sale of personal property, when the purchaser fails or refuses to complete the purchase, the vendor may sell the property and charge the purchaser with the difference between the contract price and the price realized on such sale. (2 *Parsons on Contracts*,

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483-7. *Sands v. Taylor*, 5 *John*. 395. *Bement v. Smith*, 15 *Wend*. 493. *Stanton v. Small*, 3 *Sandf*. 230. *Sedgwick on Damages*, 282.) It follows that the ruling of the court upon the admission of evidence and in the charge to the jury was correct. As the boat was sold in connection with other property, it was competent to ascertain what was realized for the boat separately, either by showing what the other property was worth, or by showing the price fixed upon each in the contract of sale. If the rule of damages claimed by the plaintiff, and laid down by the court, is correct, the evidence offered by the defendant, that the boat was worth more when it came into the possession of the plaintiff in the fall of 1856, than when the contract was made, was immaterial, and was properly excluded: 1st. Because the defendant had his option to take the boat in the following spring. 2d. Because the plaintiff had the option to fix the value by a sale, and this right could not be defeated by the arbitrary opinion of a witness. 3d. It does not appear that there was any market for such property, by which its value could be determined. Equally proper was the exclusion of evidence that the horses were in as good condition at the time of the offer to return them as when the purchase was made. The defendant, by selling one and keeping the other several months after he ascertained the fact on which his claim to return the horses was founded, precluded himself from any right to make such return.

IV. No notice of the plaintiff's intention to sell the boat was necessary, in order to make the defendant liable for the difference between the contract price and the price realized on the sale. 1. The condition of the contract that the title to the boat was to remain in the plaintiff till full payment of the purchase money, was in itself notice of all rights of the plaintiff, one of which was the right of sale. 2. The plaintiff did give notice to the defendant of his intention to sell the property in case the defendant refused to perform his contract. If any notice was required, this was all that was necessary.

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V. It is eminently just and equitable that a party who breaks his contract should make the other party good for the damages which his breach has occasioned, and that when a certain means of ascertaining such damages has been adopted, it should not lie in the power of the party in fault to defeat the claim for such damages by the uncertain and variable opinions of witnesses.

By the Court, E. DARWIN SMITH, J. There being in this case no exceptions to the charge of the judge at the circuit, except in relation to the question of damages, it must be assumed that the charge was unexceptionable upon the merits, and the questions of facts arising upon the evidence, under the pleadings, were in due form properly submitted to the jury. The breach of the defendant's contract, as alleged in the complaint, consisted in his neglect and refusal to employ the boat in question in transporting freight for the plaintiff, and in abandoning the said boat after using the same during the greater portion of the season of navigation, whereby the plaintiff was obliged to receive the same injured and deteriorated in value. In finding for the plaintiff, the jury have affirmed, in effect, that the defendant was guilty of the breach of contract alleged, in manner and form as claimed in the complaint. In the absence of any precise statement of the charge upon questions of fact submitted to the jury, it must be assumed that such was the issue duly and fairly submitted to them.

It appears that the canal boat in question made four trips in the season of 1856, and that the last trip was in the month of August, and the \$40 mentioned in the contract was duly paid to the plaintiff on or out of the freight of each trip. There was, therefore, no breach of contract or refusal of the defendant to perform the same on his part, till after these trips were completed. From the evidence, the jury would have been warranted in finding, and must have found, that the defendant abandoned the boat and the employment of the plaintiff about the 1st of September, 1856, and that the plain-

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tiff, by reason of such abandonment, resumed the possession of the same about the 1st or early in the month of October afterwards. The contract was then put an end to by the voluntary abandonment of the boat and the use of the same in the service of the plaintiff, by the defendant, early in the fall of 1856. From the time the plaintiff thus resumed the possession of the boat, he must be deemed under this verdict to have asserted his rights of property in it as *owner*, and the contract should be deemed at an end, except so far as it affects or controls the rights of the parties in respect to the question of damages.

Treating the contract as thus broken and put an end to by the voluntary abandonment by the defendant of the plaintiff's employment, and of the use of the boat in his service, on or about the 1st of September, the plaintiff was entitled to recover such damages as resulted from such violation or breach of the contract. Assuming the value of the boat and horses to have been the contract price when the defendant received them, which he could not deny, the plaintiff's damages would be the difference or deterioration in value of the boat between the time when the defendant took possession and the time when the plaintiff resumed the possession thereof, the value of the horses retained by the defendant, and any other loss or injury sustained by the plaintiff from the neglect or refusal of the defendant to carry his freights in the season of 1856, with interest thereon, deducting therefrom the amount paid by the defendant towards the purchase money for the boat and horses.

The judge in his charge advised the jury that the plaintiff was entitled to recover the \$800, the price fixed in the contract, on the sale of the boat and horses, and interest from date, less the sum of \$550, for which the plaintiff sold the boat, the same to be applied as of the time of such sale, and less also the four payments of \$40 each made on the contract. The charge treats the plaintiff as a trustee of the boat. He was not such a trustee. He has never parted with the title.

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He was selling his own boat, as he lawfully might. If the boat had deteriorated in value while in the defendant's possession, the plaintiff was entitled to throw such loss upon him and recover the difference in value; but he obviously could not by his own voluntary act, without notice to the defendant, and without his knowledge, by a private sale of the boat, fix the measure of his damages. This would open the door to great injustice in such cases. If the plaintiff were to be regarded as a mortgagee or pledgee in possession, having merely a lien on the boat for his debt—the balance due on the purchase—he could not then sell at private sale without notice to the defendant, and bind him by the price. (2 *Kent*, 82, 83. 2 *Story*, 1008.)

But if the plaintiff is to be regarded as a vendor in possession, and entitled to sell the boat and charge the vendee with the difference between the contract price and that realized at the sale, he should still not have sold without notice to the defendant. (*Sands v. Taylor*, 5 *John*. 395. *Bement v. Smith*, 15 *Wend*. 493.)

I think the exception to the charge on this point well taken, and that the judgment should be reversed, and a new trial granted.

New trial granted.

[CAYUGA GENERAL TERM, June 6, 1859. *T. R. Strong, Johnson and Smith*, Justices.]

 KNOWLTON vs. MICKLES.

In actions on awards, as in other cases under the code, a defendant may put in an answer alleging facts sufficient to vacate the award, and pray an affirmative judgment to that effect. He is no longer driven to a cross action for that purpose.

Where, in an action upon an award, the answer alleged that the arbitrators examined witnesses in the presence of one party and in the absence of the other, and the defendant asked that for that cause the award should be set

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aside; and the referee found that issue in favor of the defendant, finding also that the arbitrators acted from misapprehension, and not corruptly; *Held*, that it was no ground of objection to the action, that the arbitrators were not made parties.

Where arbitrators proceeded to examine the premises in dispute, in the absence of one of the parties—the other party being present—and made various inquiries of, and called for and listened to the statements of, several persons as to their knowledge of the damage claimed by the party who was present, and the cause thereof, without the knowledge and in the absence of the other party; such statements not being made on oath, nor reduced to writing, and the arbitrators subsequently made an award in accordance with such statements; *Held* that the award was invalid, although there was no evidence showing that the arbitrators acted corruptly, or intentionally violated their duty.

APPEAL from a judgment entered upon the report of a referee. The complaint alleged that on the 30th of August, 1853, the plaintiff commenced an action in the supreme court, against the defendant, to recover damages sustained by the plaintiff by reason of the overflowing of water from the defendant's dam, upon the plaintiff's land; in which action the plaintiff demanded judgment for such damages to the amount of \$500, and that the defendant be required to remove the said dam, and for further relief. That on the 15th day of September, 1853, the said plaintiff and defendant submitted all the matters in controversy in the said suit to the arbitrament of Daniel K. Sherwood and William Orser, by their submission in writing, and that on the 6th day of October, in said year, the time for the delivery of the award of the said arbitrators was extended or deferred to the 12th day of October, in said year, by an agreement in writing signed by the said parties. That on the said 12th day of October, 1853, the said arbitrators made an award in writing, under their hands, and delivered the same to the plaintiff, and of which the defendant had due notice on the 15th day of October, 1853. And the plaintiff alleged that the defendant had not kept and performed said award, or any part thereof, but had wholly neglected and refused, and still neglected and refused to do so. That since the 6th day of November, 1853, by

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reason and means of the failure and refusal of the defendant to remove the said dam, or rebuild or reconstruct the same as in and by the said award required, the plaintiff had suffered further and other damages to his said premises below the said dam, to the amount of \$500. The plaintiff therefore demanded judgment against the defendant as follows: 1st. For the sum of \$137.50, for the damages and costs, (including the costs of the said arbitrators,) as awarded by said arbitrators as aforesaid. 2d. That the defendant might be required to remove the said dam, or rebuild, or reconstruct the same as required in and by the said award. 3. For the damages that had accrued to the plaintiff since the 6th day of November, 1853, by reason of the neglect and refusal of the defendant to remove the said dam, or rebuild or reconstruct the same, as required in and by the said award, the sum of \$500, and also for the costs of this action.

The defendant, by his answer, admitted the pendency of the action mentioned in the complaint, and the submission of the controversy to arbitration, and that the time for the delivery of the award was extended to October 12, 1853. He alleged that he had no knowledge or information sufficient to form a belief, and he therefore denied that on the said 12th day of Oct. 1853, the arbitrators made an award in writing, under their hands, and delivered the same to the plaintiff. And he averred that he never had any notice of the time or place, when or where the said arbitrators would meet to hear the matters submitted to them, nor did the defendant ever have any chance or opportunity of appearing before said arbitrators, nor of producing proof, nor examining witnesses, nor of being heard in his defense before said arbitrators, and that the alleged award, set up in the complaint, was made without any information or notice thereof to the defendant until long after the day when the same was alleged in the complaint to have been made. That the said arbitrators, on the 12th day of October, 1853, and while examining the premises, and preparing their award, or immediately prior thereto, and on the

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same day, did examine several witnesses touching the matters submitted to them by the parties, and took and heard their statements in respect thereto, in the presence of the plaintiff, and in the absence of, and unbeknown to, and without the consent of the defendant; for which causes, among others, the defendant averred that the said award was void, and the plaintiff was not in any way entitled to have the same enforced or carried into execution, nor to receive judgment thereon, nor to recover any sum or damages for non-performance thereof by the defendant. The defendant further alleged that said submission was not made a rule of court, nor was any judgment rendered on said award; that he was advised, and verily believed to be true, that he had a good and substantial defense upon the merits, in the matter submitted to said arbitrators, and that he would have been entitled to an award in his favor, had an opportunity been afforded him of producing his proofs before the said arbitrators. He denied that since the 6th day of November, 1853, by reason and means of the failure and refusal of the defendant to remove the said dam, or rebuild or reconstruct the same, as in and by the said award required, the plaintiff had sustained further or other damages to his premises, below the said dam, to the amount of \$500, or to any amount whatever. And the defendant insisted, that if any damage had been done to the plaintiff's premises below said dam, since the 6th day of November, 1853, in consequence of any wrongful act of the defendant, such damage was not caused by the defendant's failure and refusal to remove the said dam, or rebuild or reconstruct the same, as in and by the said award required; but the same was caused by defendant's first act of building said dam and embankments; and the defendant submitted that for any such wrongful acts the plaintiff was not entitled to recover in this action on the award, and that such claim for damages was misjoined with an action to enforce the award; and the defendant prayed that he might have the same benefit and advantage of this misjoinder, as if the same

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had been fully stated in the complaint, and the defendant had demurred thereto. The defendant denied that the plaintiff was entitled to any judgment for damages, and asked that the said paper set up in the complaint, purporting to be an award, might be pronounced by the judgment of this court null and void, as to the defendant, and that the plaintiff's complaint might be dismissed, with costs.

The referee found and reported the facts above stated, relative to the pendency of a suit between the parties, and the submission of the controversy to arbitration; that the arbitrators proceeded to examine the premises in dispute, in the absence of the defendant, attended part of the time by the plaintiff in person, and then and there made various inquiries of, and called for, and listened to the statements of not less than three persons as to their knowledge of the damage, and the cause thereof, and without the knowledge and in the absence of the defendant; but that he had no means of judging what influence such statements had on the minds of the arbitrators, except that their award was made in accordance with such statements. Upon the authority of *Walker v. Frobisher*, (6 *Vesey, jun.* 70,) he did not see how such an award could stand, and he therefore found, on the above facts, that the same was valid, and that judgment should be rendered for the defendant, on the whole case. The referee further found, as matters of fact, that the statements called for and listened to by the arbitrators were not given under oath; that such persons were not sworn, and that their statements were not taken down or reduced to writing by said arbitrators. And that there was no evidence given in said action tending to show that said arbitrators acted corruptly, or intentionally violated their duty; but that their *ex parte* examination probably resulted from a misapprehension of their duties.

Judgment having been rendered for the defendant, upon this report, for costs, the plaintiff appealed.

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M. L. Cobb, for the appellant.

Edward Wells, for the respondent.

By the Court, EMOTT, J. What was said in *Owen v. Boerum*, (23 Barb. 187,) as to the defenses which could be interposed in a suit upon an award, had reference to the case then before us, which had a purely legal aspect throughout. The action was for a trespass; the arbitration and award were pleaded as a defense, and the plaintiff, under the code as it then stood, permitting a reply, denied generally the allegations of the answer. The question was not, therefore, what relief might have been had in the action, by either party, against the award, but what evidence was proper under a state of pleadings which set up only legal rights. There cannot be any doubt that in actions on awards, as in other cases under the code, a defendant may put in an answer alleging facts sufficient to vacate the award, and pray an affirmative judgment to that effect; and that he is no longer driven to a cross action for that purpose. It was said that an action cannot be maintained to set aside an award for misconduct of the arbitrators without making them parties; but this is not the rule. They might be made parties under the former practice, where the bill charged them with fraud or gross misconduct, for the purpose of obtaining a discovery from them, and then the court might make a decree against them for the costs. *Van Cortlandt v. Underhill*, (17 John. 405,) was a case of this kind. Ch. J. Spencer, in the court of errors, speaks of the conduct of the arbitrators as gross and scandalous misbehaviour, outraging every principle of justice. (See also 2 Atk. 396.) Unless charges of this description were made in the bill, against the arbitrators, they were not compellable to discover the grounds of their award, and in that event they might demur to the bill. (*Story's Eq. Jur.* §§ 1498, 1500. *Story's Eq. Pl.* § 232. 8 How. U. S. Rep 134.)

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In the present case, the answer as amended alleged that the arbitrators examined witnesses in the presence of one party and in the absence of the other, and asked that for this cause the award should be set aside. This answer brings the parties and the question before the court precisely as they would be in a cross action. The referee has found this issue in favor of the defendant, finding also that the arbitrators acted from misapprehension, and not corruptly. They would not therefore have been mulcted in costs, if they had been before the court, and it is no ground of objection that they are not here.

Upon the main question, I think the referee was right in his conclusion. The point upon which Lord Eldon put his decision in *Walker v. Frobisher*, (6 Ves. 70,) was that the statements of the persons who were examined in the absence of the parties did not pass as mere conversation. The fact that these statements were reduced to writing, he considered sufficient to establish this. In the present case, the statements of *Van Wart* and *Cypher* were called for by the arbitrators themselves, and were given at their request, in the presence of the plaintiff. This is quite as strong a circumstance to show that the information acquired was considered material, and not to be mere conversation, as if such information had been reduced to writing. It does not change the case that the statements of these persons were not made under oath. The admission of such evidence would be more dangerous without oath than with it. I do not speak with reference to this particular case, but we are obliged to adhere to a general rule in cases of this description; and from reasons of public policy, that rule ought to be a stringent one. It has been said by many of the judges that it is impossible for the courts, or even for arbitrators themselves, to say what influence such statements may have had upon them. We must go upon the general rule which condemns such a practice.

The judgment should be affirmed.

[KINGS GENERAL TERM, February 14, 1859. *Lott, Emott and Brown*, Justices.]

COBB, adm'x &c., vs. HARMON and WARFIELD.

Where proceedings are instituted before a county judge, against a judgment debtor, under the "Act to abolish imprisonment for debt," and to avoid a commitment, for fraud, the debtor executes a bond, with two sureties, conditioned that he will, within thirty days, "apply for an assignment of all his property, and for a discharge as provided in the 12th section of the said act," and "diligently prosecute the same until he shall obtain his discharge;" and the judgment debtor accordingly makes an application to the county judge of the county in which he resides, and on the day fixed for the hearing, the county judge is absent from the county and disabled, by sickness, from hearing it, the obligors in the bond are not thereby excused from performing their obligation and discharged from liability thereon.

If, after an application has been made to the county judge of a particular county, it is found that such judge cannot entertain it, within the 30 days, and grant the discharge, the judgment debtor is bound to continue the proceedings before some other officer, if any one can be substituted, in time.

Under such circumstances, the county judge of an adjoining county can be procured to attend at the time and place specified in the notice, and continue the proceedings, in the same manner and to the same effect as if they had been commenced before him. And it is the duty of the judgment debtor to procure such attendance, and to prosecute the proceedings before the substituted judge.

THE plaintiff's intestate, C. Cobb, instituted proceedings against James Herrick, before John M. Bradford, county judge of Ontario, in pursuance of the act of 1831, "to abolish imprisonment for debt." To avoid a commitment, Herrick and the two appellants as his sureties, executed the bond set out in the complaint, dated 15th September, 1856, and conditioned that Herrick should, "within the thirty days from the date thereof, apply for an assignment of all his property, and for a discharge as provided in the 12th section of said act, and diligently prosecute the same" until he should obtain such discharge. This action was brought upon that bond. The action was referred to O. H. Palmer, Esq. as sole referee. On the trial before him, the following facts were proved, and the referee found and adjudged the same to be true: 1. That on the 27th day of August, 1856, Crittenden Cobb, the plaintiff's intestate, recovered a judgment in the supreme court against

the defendant James Herrick, for \$1077.43 damages and costs, which was docketed in the clerk's office of Niagara county, and a transcript of which was filed, and the judgment docketed, in the clerk's office of Ontario county, on the 28th of August, 1856. 2. That on the 12th day of September, 1856, Cobb made application to the county judge of Ontario county, upon affidavit, in pursuance of the act entitled "An act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April 26, 1831, for a warrant to arrest said Herrick, and such application was granted and warrant issued to the sheriff of the county of Ontario, in which county Herrick then resided, and Herrick was arrested by virtue of said warrant and taken before said county judge on the 15th day of September, 1856. 3. That such proceedings were had before said county judge that he was satisfied that the allegations in the complaint made before him were substantiated, and that Herrick had unjustly refused to apply to the payment of said judgment, property and rights of action which said Herrick had, and did thereupon decide to make an order committing said Herrick pursuant to said act. 4. That to avoid such commitment, Herrick, and the defendants Harmon and Warfield as his sureties, on said 15th day of September, 1856, executed the bond set out in the complaint and on which this action is brought, and Herrick was thereupon discharged from arrest. 5. That Herrick, in pursuance of the provisions of said act, caused to be drawn, in due form, a petition for an assignment of all his property, and for his discharge, addressed to the said county judge, and also an alleged account of his creditors, and an alleged inventory of his estate, and annexed to said petition, account and inventory, an affidavit as required by section 13 of said act; and on the 22d day of September, 1856, he duly took and subscribed said affidavit, before said county judge, and at least fourteen days prior to the 11th day of October, 1856, he caused a notice that such petition would be presented to said county judge at his office in Geneva, on said 11th day of October, 1856, at 10 o'clock A. M., together

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with a copy of such petition and of said account and inventory thereto annexed, to be duly served personally on said Crittenden Cobb, as required by the provisions of section 14 of said act. 6. That on the 4th day of October, 1856, said Crittenden Cobb died; and on the 7th day of the same month, the plaintiff was appointed administratrix of his personal estate. 7. That on the 11th day of October, 1856, Herrick, with his counsel, appeared at the office of said county judge in Geneva at the hour specified in said notice, for the purpose of presenting the said petition to said judge, and delivering such account and inventory, and prosecuting the proceedings on said petition, and prepared to do so in good faith, and that the attorney of the prosecuting creditor was also at the office of said judge at the same time, to look after the plaintiff's interests in the matter; but that the said judge was not in the county, and was sick, so as to be unfit to discharge the duties of his office, and continued unfit until after this suit was commenced, and Herrick did not further prosecute his application before said judge. 8. That no judge of the supreme court resided in Ontario county, in the year 1856. 9. That this action was commenced on the 31st day of October, 1856. 10. That in January, 1857, upon the coming in of the new county judge of Ontario county, a new notice was served upon the plaintiff, as administratrix of Cobb, of an application for a discharge of Herrick upon the former petition of said Herrick; that in pursuance of that notice the administratrix appeared before said judge, but Herrick failed to appear, and no application or order was made in the premises, and the proceedings were not continued. The aforesaid facts being proved, the plaintiff's counsel insisted, and the referee found and held and decided, that Herrick did not diligently prosecute his application for an assignment and discharge. The referee also held and decided as matter of law, that the plaintiff by reason of the premises was entitled to judgment in this action against the defendants for \$1230.17, besides costs. And from the judg-

ment entered upon his report, the defendants Harmon and Warfield appealed.

James C. Smith, for the appellants.

Wood & Murray, for the plaintiff.

By the Court, E. DARWIN SMITH, J. When the hearing, before the officer before whom the proceedings under the non-imprisonment act against the defendant Herrick had been instituted, was concluded, by his decision convicting Herrick of fraud, and he had taken from the defendants the bond upon which this action is brought, the jurisdiction of the officer was at an end. There was no longer any *lis pendens* before him—nothing to abate by the death of the plaintiff's intestate. From that time the defendant Herrick and his sureties, if they wished to avoid the bond then and there executed to procure the discharge of Herrick from imprisonment, became the *actors*. It was for the defendant Herrick, within thirty days, to apply for an assignment of his property and for his discharge, as provided in the act. He made his application, in due time, to the county judge of Ontario, the county of his residence, and at the day fixed for the hearing, the county judge was absent from the county and disabled by sickness from hearing it, and the proceeding therefore became discontinued. And it is now claimed by the counsel for the defendants, that Herrick being then a resident of Ontario county, the county judge of that county was the only officer to whom the application for his discharge according to the provisions of said act could properly have been made, and that such county judge being entirely incapable of hearing and granting such application on the day fixed for that purpose, it became *impossible* for the defendants to perform the obligation of the bond, and that they are therefore excused from such performance, and discharged from all liability thereon. This question has been so fully examined, in the opinion of the learned referee who

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tried the cause, that I should have felt entirely satisfied to affirm the judgment upon the views so well expressed in his opinion ; but the case has been argued here with so much earnestness and ability, and we have been presented with a brief of counsel so elaborately prepared, that I have deemed it my duty to examine the case, as I have done, with particular care. If the obligation of the defendants were to be regarded as an ordinary contract voluntarily entered into, it would hardly be contended, I presume, that any mistake or misfortune, or inevitable accident or unforeseen impediment, would discharge the defendants from their duty ; because, in such cases, they might have provided against these contingencies in the contract. It is only when the *law* creates or casts the duty, that the party may be excused from compliance, when he is disabled from performing it, without any fault on his part, by the act of God or of the law, rendering performance impossible. (*Beebe v. Johnson*, 19 *Wend.* 500. *Harmony v. Bingham*, 2 *Kernan*, 99. 1 *id.* 25.)

The bond given in this case was one prescribed and required by law ; and I think it should be governed by the same rules of responsibility which apply to special bail. It is like the bond to the sheriff on a *capias ad respondendum*, or the obligation assumed by special bail. It is a bond given to procure the discharge of a party from imprisonment, given and executed under and in pursuance of the requirement of the law. In this view of the obligation incurred by these defendants, if it clearly appeared that the law had rendered compliance with the obligation of the bond *impossible*, I think the defendants should be excused from such performance. By the original section 12 of the act to abolish imprisonment for debt, the application which the defendant Herrick was bound to make might have been made to a justice of the supreme court, a circuit judge, any judge of the county court, or a supreme court commissioner in the county in which such defendant resided or was imprisoned. From the whole statute, and the several provisions of the revised statutes therein referred to, and from

the obvious implications and policy of the act, I think the limitation, applied apparently to the supreme court commissioner in said section, as the same is punctuated in the original act as printed in the session laws of 1831, was intended to apply to all the officers named in the act, and that the punctuation is erroneous—the mistake, probably, of the printer or copyist. I can see no object in applying the limitation to a supreme court commissioner that would not apply to either of the five county judges in each county, composing the county courts under the constitution then existing, or even to the circuit judge or justices of this court. It could hardly have been the intention of the legislature to allow these applications to be made to a justice of this court or a circuit judge, at the option of the applicant, in any part of the state. I think, therefore, that the county judge of Ontario, (no justice of this court residing in the county,) was the only proper officer to whom this application could have been made at the time while the defendant Herrick continued to reside in that county. But if it could not be granted in Ontario county, for any reason, I have no doubt that Herrick was bound to remove into some other county, if necessary to confer jurisdiction upon some other officer. (*Beebe v. Johnson*, 19 *Wend.* 500.) But the application having been made to the county judge of Ontario county, when it was found that he could not entertain it within the thirty days and grant the discharge, the defendant Herrick was still bound to continue the proceeding before some other officer, if any one could in time have been substituted in his place. By section 19 of the original act to abolish imprisonment for debt, the general provisions applicable to the proceedings under the several articles of title first, part 2d of the revised statutes, which are contained in the seventh article of said title, were made applicable to the proceedings under said act, “so far as the same is not inconsistent with the provisions thereof.” Sections 4, 5 and 6 of the said seventh article contain general provisions applicable to the proceedings under the several articles of said title first of chapter five, referred to ;

and these provisions of said sections 4, 5 and 6, were all designed to provide against the failure of proceedings under any of the articles of said title by reason of the non-residence of the proper officer in any county, or by reason of the death, sickness, resignation, removal from office, absence from the county, or other disability of any officer before whom any proceedings may have been commenced under either of the articles of said title.

By section six it is provided that if there be no officer in any county competent to continue proceedings commenced by any officer in the cases specified in either of said articles, then any judge of the county courts may attend at the time and place appointed for the hearing of the matter, and adjourn the same to the next court of common pleas to be held in and for said county in which such hearing was appointed; which court shall proceed therein in the same manner and with the like authority as the officer who commenced such proceedings.

If these proceedings are applicable, then any judge of the court of sessions, which is the only county court now existing composed of several judges, might have attended at the time and place fixed for the defendant Herrick to make his application, and adjourned the hearing thereof. But if these proceedings are not applicable to the case—and I do not think they are—then section 58 of chapter 3, part 3, article second, (2 R. S. 284, 3d ed.) referred to by the referee, is applicable, (a) for the reason therein expressed, that “no express provision

(a) By that section it is enacted that “in case of the death, sickness, resignation, removal from office, absence from the county of his residence, or other disability of any officer before whom any special proceedings authorized by any statute may have been commenced and where no express provision is made by law for the continuance of such proceedings, the same may be continued by the successor in office of such officer, or by any other officer in the same county who might have originally instituted such proceedings; or if there be no such officer in the same county, then by the nearest public officer in any other county who might have originally had jurisdiction of the subject matter of such proceeding, if such matter had occurred or existed in his own county.” (Also see §§ 59, 60.)

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is made by law for the continuance of such proceedings." Under this section, there being no officer residing in Ontario county authorized to continue said proceedings, the county judge of Seneca county, or of Yates or Wayne, as the case may be, could have been procured to attend at the time and place specified in the notice, and continue said proceedings, in the same manner and to the same effect as if such proceedings had been commenced before him. This is a general statute, of universal applicability to all cases where, for want of any express provision to continue any special proceeding, there would otherwise be a failure of such proceeding. It was the duty of Herrick to procure such attendance and substitution.

The day fixed for the hearing before the county judge of Ontario was October 11th. The bond is dated September 15th, 1856. Herrick then had, inclusive of the 11th day of October, five days in which to get his application legally before, or transferred to, some other proper officer. By section 53 of said last mentioned chapter, notice for such time and place out of the county as the substituted officer should think fit, might have been given, and the application could have been duly made within the thirty days. It was not essential that the discharge should be obtained within the thirty days. Herrick was to "*apply* within the thirty days," and "*diligently prosecute* until he obtained the discharge." But if, by reason of the delay of Herrick in giving notice of his application till a late day of the thirty days, his proceedings failed, that would be his fault, and he would have no excuse in law. He was bound to foresee and provide against the very contingency which did happen, and avoid it by his diligence in making his application. It was not *impossible* for him to have made his application within the thirty days. It will hardly do to say that the inability of one officer in the state to entertain the application creates an impossibility in law, when ample provision is made for such contingency. Herrick undertook to make the application within the thirty days. He was bound

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to see, at his peril, that he made it in a proper and efficient manner, so that no mistake or accident could intervene to prevent its being effectual to enable him to fulfill his obligation and discharge his bond. We think the referee rightly disposed of the case, and upon proper grounds, and that the judgment should be affirmed.

Judgment affirmed.

[CAYUGA GENERAL TERM, June 6, 1859. *T. R. Strong, Johnson and Smith, Justices.*]

DAVIS, receiver &c., vs. DANIEL GRAVES and JACOB GRAVES.

Where a grant of land is made to one person, the consideration for which is paid by or in behalf of another, the legal title is in the grantee, notwithstanding the conveyance is made for the purpose of defrauding the creditors of the grantor, and upon a parol trust in his favor. And so long as the grantee holds such title, the property is subject to the claims of his creditors, to the same extent as any other property to which he has title.

But until such creditors obtain a *lien* upon the property, the grantee's right of alienation is perfect in respect to it; and it is not a fraud upon his creditors for him to convey it to the real owner.

Until the creditors of the grantee have acquired liens upon such land, they have no legal or equitable claims in respect to it higher than, or superior to, those of the grantor; and if the fraudulent grantee reconveys such land to the grantor, before such creditors have acquired any lien thereon, the creditors have no right to have the conveyance set aside as fraudulent.

IN the year 1849 Jacob Graves made a general assignment of all his property, for the benefit of his creditors. About the same time, with intent to defraud his creditors, he conveyed a large amount of real estate to his brother, Daniel Graves. In 1851 he caused Mark H. Sibley to convey a valuable piece of real estate to Daniel Graves, the consideration for which was paid by Jacob. No trust was declared in writing. But it was alleged by Jacob Graves, in his answer, that Daniel Graves agreed with him by parol, at the time of taking the conveyance, that he would convey the said premises to

him, Jacob Graves, whenever he should be requested to do so. It turned out that Jacob was not in fact insolvent, and in 1853, the debts provided for by the assignment having been paid, the assignees reassigned to him the property remaining in their hands. On the 1st of February, the 23d of May and on the 9th of June, 1856, respectively, Daniel Graves executed three promissory notes to Joseph Cochrane for debts contracted in the year 1856, the title to said real estate still remaining in him, and he having informed such creditor that the same belonged to him. On the 18th day of June, 1856, Daniel conveyed all said real estate to Jacob, without consideration, and was then insolvent. Judgment upon said notes was subsequently obtained by Cochrane, and on proceedings supplementary to execution, the plaintiff was appointed receiver of Daniel. This action was commenced by the plaintiff as such receiver, to set aside said conveyance to Jacob, as fraudulent. The referee decided that the conveyance was not fraudulent, as to the creditors of Daniel Graves, and therefore he dismissed the complaint. From the judgment entered upon his report, the plaintiff appealed.

J. C. Cochrane, for the appellant. I. Upon the conveyance of the real estate to Daniel Graves a trust was or was not created. If there was no trust, then the estate became his property absolutely, and a voluntary conveyance was of course a fraud upon his creditors. If a trust was created, it was not contained in the deed to Daniel, and as against his creditors without notice, the trust is void and the conveyance absolute. (2 *R. S.* 140, § 76, 4th ed. 3 *id.* 21, § 83, 5th ed.)

II. No trust, title or interest, legal or equitable, resulted to Jacob from the fact of his paying the consideration. (2 *R. S.* 137, § 51, 4th ed. *Garfield v. Hatmaker*, 15 *N. Y. R.* 475.)

III. The trust in favor of Jacob's creditors could only be taken advantage of by them, and to the amount of their debts, upon the ground that the conveyance is presumed to be fraud-

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ulent as to them. These debts being paid, the conveyance became absolute as to all persons. (2 R. S. 137, § 52, 4th ed.)

IV. As between Jacob and Daniel, the trust was also void, for the reason that it was not in writing. (2 R. S. 316, § 6, 4th ed.)

V. The decision of the referee nullifies the statute. Jacob Graves conveys a large amount of real estate to Daniel by absolute deeds, and allows him to hold the same as his own, for years. Creditors without notice suffer him to contract large debts upon the faith of this very property which he claims to own. The debts being incurred, he reconveys the whole property to Jacob, who has stood by and enabled him to perpetrate the fraud, and probably received the proceeds of these very debts. Yet the referee holds that Daniel's creditors have no right to complain.

S. Mathews, for the defendant, Jacob Graves. I. The conveyance by Sibley to Daniel Graves (the consideration having been paid by Jacob Graves) created a resulting trust in favor of Jacob Graves. The statute, however, rendered this trust void, and gave to Daniel an absolute estate in the land, except as to the creditors of Jacob Graves. But the express agreement of Daniel to convey to Jacob when requested, was independent of the trust, and although void at law, because not in writing, created an equitable obligation upon Daniel to convey the land according to the agreement. Upon the faith of this agreement, Jacob paid the whole consideration, except the \$1400, and he paid the interest upon the \$1400 for five years before the conveyance by Daniel to him. Daniel Graves would not have been allowed, under these circumstances, to retain the land and the money. He would have been required, either to convey the land or restore the money. He chose the former, and no one has any right to complain. (2 *Story's Equity*, § 760.)

II. But the referee has found, that the conveyance was made to Daniel Graves, with intent to hinder, delay and de-

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fraud the creditors of Jacob Graves. It is certainly difficult to see what that has to do with the present case. No creditor of Jacob Graves is here to question the validity of that conveyance. Can a creditor of Daniel be permitted to say that the transaction was fraudulent and void? If it were void, then Daniel Graves obtained no title to the land, and the plaintiff in this action is not entitled to it. But it may be said that the transaction was valid between the parties, and that Jacob could not enforce the agreement to convey to him. Neither party, it is true, could compel an execution of the agreement, for the reason that both parties being *in pari delicto*, the courts will not aid either. But it has always been held that the parties to an unlawful contract may themselves voluntarily execute it or reform it; and the court will give effect to such voluntary act. So much and no more was done in this case.

III. It will, however, be insisted that the case comes within the provision of the 76th section of the statute of uses and trusts. (2 *R. S.* 140, 4th ed.) There are several answers to this proposition; and (1.) The statute refers only to cases of express trusts, such as are authorized by the same statute. The section is as follows: section 76, (§ 64.) "Where an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute as against the subsequent creditors of the trustees, not having notice of the trust, and as against purchasers from such trustees without notice, and for a valuable consideration." This section most obviously applies to valid express trusts, and not to parol trusts, or trusts resulting or arising by implication of law. (2.) This section was not intended to render the trust invalid in favor of creditors at large; but only as to such as might acquire a valid lien by judgment or other proceedings against the trustee. (3.) It is, however, sufficient, for the present case, to say, that the trust here is not an express trust. The payment of the purchase money created a resulting trust, or a trust arising by implication of

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law; but the true view of it is that the parties held the relation of vendor and purchaser, and Daniel Graves was simply a trustee for his vendee, which is also a trust arising by implication of law.

IV. If the plaintiff should succeed in this action, the effect of it would be that the money and property of Jacob Graves would be applied to the payment of the debts of Daniel Graves. Jacob Graves has never in fact got a dollar of Daniel's property. It would be most inequitable to require him, under these circumstances, to pay the plaintiff's debt.

By the Court, E. DARWIN SMITH, J. The conveyance from Sibley to Daniel Graves vested in him the complete legal title to the premises described in the *deed*, free from all claim or trust, legal or equitable, enforceable at law in behalf of Jacob Graves. (1 R. S. 728, § 51.) By force of section 52 of the statute, (*Id.* 728,) the conveyance was fraudulent as against the creditors at that time of Jacob Graves, and a trust resulted in favor of such creditors to the extent that might have been necessary to satisfy their just demands. No such creditors have sought to reach the property in the hands of the fraudulent grantee, and it appears that all such creditors were fully paid before the conveyance from Daniel to Jacob Graves.

But if this were not so, no such creditors are now seeking to question the validity of the original conveyance. It is the creditors of *Daniel* Graves whose claims are now before the court in respect to this property. While he held the title to this property, it was subject to the claims of his creditors, as much as any other property to which he had title. But the plaintiff, or the creditor whom he represents, had acquired no lien upon this property before its conveyance to Jacob Graves, its equitable and real owner. Section 76 (or 64 of 1st ed.) of the statute, to which the counsel for the appellant refers, does not affect the question. That section declares that when an express trust is created, but is not contained or declared in

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the conveyance to the trustees, such conveyance shall be deemed absolute, as against subsequent creditors of the trustees. But there was in this case no *express trust* declared in any instrument. Daniel Graves was not a *trustee*. He was a fraudulent *grantee* as against the creditors of Jacob Graves, and took an absolute fee in favor of, or as against, his own creditors. No creditor of his was bound to regard him as holding this property upon any *trust, expressed or implied*. He held the absolute title, as we have seen, under section 51 of article 2d "Of uses and trusts." (1 *R. S.* 728.) But until some creditor of his obtained a lien upon it, his right of alienation was perfect in respect to it; and it was not a fraud upon his creditors to convey it to the real owner, Jacob Graves.

He was under no legal obligation to make such conveyance, but he was under a high moral and equitable obligation to do so. And the law is not so unjust that it will deny to men the right, while it is in their power to do so, to recognize and fulfill their obligations of honor and good faith. Until the creditors of Daniel Graves had acquired liens upon this land, they had no legal or equitable claims in respect to it, higher than, or superior to, those of Jacob Graves.

It was not, in equity or good conscience, the property of Daniel Graves, and was, in his hands, only subject to claims of his creditors by way of penalty, and to subserve the general policy of the law in respect to the title, use, enjoyment and transfer of real estate, and to repress and hinder frauds.

The decision of the referee was clearly right, and the judgment should be affirmed.

Judgment affirmed.

[CAYUGA GENERAL TERM, June 6, 1859. *T. R. Strong, Welles and Smith, Justices.*]

CHURCH and others *vs.* BROWN.

A guaranty, indorsed upon an agreement for the sale of goods, and bearing even date therewith, by which a third person promises as follows: "I will be responsible for all such goods as Mr. White shall buy of the Messrs Church, within one year from date, which shall not be paid for according to the terms of the within contract," is void, for the want of a consideration expressed therein.

The decision in *Brewster v. Silence*, (11 Barb. 144; 4 Seld. 207,) reaffirmed, and held to be the existing law; notwithstanding the case of *The Union Bank v. Coster's Ex'rs*, (3 Comst. 203.)

THIS action was brought upon a guaranty indorsed upon an agreement for the sale of goods by the plaintiffs to Thomas White, in these words: "I will be responsible for all such goods as Mr. White shall buy of the Messrs. Church, within one year from date, which shall not be paid for according to the terms of the within contract. July 1, 1852.

(Signed) M. BROWN."

The guaranty bore even date with the principal agreement, and was executed simultaneously therewith. The action was tried by a referee, who held that the guaranty or agreement of the defendant was a promise to answer for the debt, default or miscarriage of the said White. And he found, as a conclusion of law, that the said agreement was void because no consideration was expressed therein as required by statute; and that the defendant was entitled to judgment in the usual form, with costs, against the plaintiffs.

From the judgment entered upon the report the plaintiffs appealed.

G. H. McMaster, for the plaintiffs. I. The consideration for the promise of the defendant is expressed in the agreement subscribed by him. (*Union Bank v. Coster's Ex'rs*, 3 Comst. 203. *Gates v. McKee*, 3 Kernan, 232. *Draper v. Snow*, 6 Duer, 665. *Grant v. Hotchkiss*, 26 Barb. 63.)

II. The referee erred in deciding that the case of *Brewster v. Silence*, (4 Seld. 207,) was conclusive against the right of

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the plaintiff to recover, and that the case of *Union Bank v. Coster's Ex'rs*, (3 *Comst.* 203,) was overruled by, or in conflict with *Brewster v. Silence*. The decisions of the courts of this state in relation to the expression of consideration in guaranties are divisible into two classes. 1st. Where the guaranty relates to a simple promissory note. 2d. Where the guaranty relates to other instruments or agreements. The following is a synopsis of the decisions of the courts in relation to guaranties of promissory notes since the revised statutes. In *Parker v. Wilson*, (15 *Wend.* 346,) a guaranty of a promissory note not expressing a consideration, made *after* the note became due, was held void. *Smith v. Ives*, (*Id.* 182,) is to the same effect. The reasoning of the court is substantially that of *Brewster v. Silence*. In *Hough v. Gray*, (19 *Wend.* 202,) the court held that a person who guarantied a note *at its inception*, might be treated as a joint maker, and it was therefore not material whether a consideration was expressed. *Luqueer v. Prosser*, (1 *Hill*, 256,) was decided in accordance with the case last cited, and approved in the court of errors, (4 *Hill*, 422,) with a slight modification. In the notable case of *Manrow v. Durham*, (3 *Hill*, 584,) it was held that a guaranty of a promissory note made *subsequent* to the note, was good as a new note, and it was not material whether a consideration was expressed or not. This case was followed until *Hall v. Farmer*, (5 *Denio*, 484,) where the supreme court adopted the doctrine of *Brewster v. Silence* in full, viz: That a guaranty of a note, whether contemporaneous with the making of the note or not, was a "special promise," and void unless the consideration was literally expressed. And see this case affirmed, and the doctrine of *Manrow v. Durham* overruled, 2 *Comst.* 533 and 553. This case was followed in *Spies v. Gilmore*, (1 *Comst.* 321,) *Brown v. Curtiss*, (2 *id.* 225,) and lastly by *Brewster v. Silence*, (4 *Seld.* 214.) The following are the principal cases of the second class, standing in chronological order: *Bailey v. Freeman*, 11 *John.* 221.

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Rogers v. Kneeland, 10 *Wend.* 219. *S. C.* 13 *id.* 115. *Marquand v. Hipper*, 12 *id.* 520. *Whitney v. Groot*, 24 *id.* 82. *Douglass v. Howland*, 24 *id.* 36. *Walrath v. Thompson*, 4 *Hill*, 200. *Benedict v. Sherill*, *Lalor*, 219. *Smith v. Dann*, 6 *Hill*, 543. *Fellows v. Prentiss*, 3 *Denio*, 512. *Staats v. Howlett*, 4 *Denio*, 560. *Union Bank v. Coster*, 3 *Comst.* 203. *Gates v. McKee*, 3 *Kern.* 232. Every one of these cases was decided by a unanimous court; not one of them is any where expressly doubted or overruled, and they are conclusive authority as to the right of the plaintiffs to recover here, unless they are overruled, by implication, in *Brewster v. Silence*. Surely it is not proper to suppose that the court of appeals would have consciously condemned such a mass of authority, without declaring their intention of doing it. Not one of the cases last above cited, is even alluded to in *Brewster v. Silence*. The cases commented upon relate to guaranties of promissory notes, and three of the judges who decided *Union Bank v. Coster*, decided *Brewster v. Silence*, viz. Ruggles, Jewett, Gardiner. *Gates v. McKee*, plainly shows that the court had no thought of overruling these cases, in *Brewster v. Silence*. The instrument in that case was a guaranty, as plainly appears from the case and opinion of the court.

III. It is not claimed that any different rule of construction applies to guaranties of promissory notes, and to other guaranties. The point decided in *Brewster v. Silence*, is that the language of the *note*, furnishes no evidence of what the consideration of the guaranty is; and the point decided in *Union Bank v. Coster*, and that whole class of cases is, that in such agreement as the defendant here has subscribed, the language of the principal and collateral agreement does furnish evidence of the consideration; and where the consideration is manifest from the language used, there it is *expressed*.

IV. The weight of authority is too great to leave the doctrine of *Union Bank v. Coster* open for discussion. The maxim *stare decisis*, applies with controlling force here.

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Morris Brown, defendant, in person. I. The agreement of the defendant on which this action is brought, is a special promise to answer for the debt, default or miscarriage of another person, viz. of Thomas White, named in the principal contract.

II. The agreement does not express, in itself, any consideration, and is therefore void by the statute of frauds. (2 *R. S.* p. 317, 4th ed.)

III. A collateral guaranty, expressing no consideration in itself, is not upheld by the consideration of the principal contract, though made cotemporaneous therewith, or at any after period. (*Brewster v. Silence*, 11 *Barb.* 144; *S. C.* 4 *Seld.* 207. *Glen Cove Mutual Ins. Company v. Harold*, 20 *Barb.* 298. *Hall v. Farmer*, 2 *Comst.* 553. *Mallory v. Gillett*, 23 *Barb.* 617.)

By the Court, E. DARWIN SMITH, J. In the case of *Brewster v. Silence*, (11 *Barb.* 144,) this court held that when the legislature expressly declared that “every special promise to answer for the debt, default or miscarriage of another person, should be void unless such agreement, or some note or memorandum thereof expressing the consideration, be in writing and subscribed by the party to be charged therewith,” it must be deemed to have intended precisely what the language used clearly imports, and that a contract of guaranty, in which no consideration was expressed, was void. The same view was reasserted in the case of *Mallory v. Gillett*, (23 *Barb.* 600.) The case of *Brewster v. Silence* goes further, and holds that it is immaterial that the original contract, (a promissory note in that instance,) whose performance it was intended to secure by the collateral contract sought to be enforced, and such collateral contract, were made at the same time and on the same piece of paper; and that there was abundant consideration for the original contract.

It was held that the original contract and the guaranty were separate and distinct contracts; and that the latter

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could not be sustained by reference to the former by force of the consideration therein expressed. This case was in distinct conflict with the whole series of decisions by which the statute has been sought to be evaded, and guaranties and other collateral contracts to answer for the debt, default or miscarriage by other persons, have been sustained and enforced upon the theory of inferring or spelling out a consideration, or supplying the defect by parol evidence, upon principles of construction contravening the letter and plain intent of the statute that one must be *expressed* in the contract. This case of *Brewster v. Silence* was affirmed in the court of appeals, (4 *Seld.* 207,) by a unanimous court; and if there be any virtue in the doctrine of *stare decisis*, it ought to be deemed *settled law*, certainly so far as this district is concerned, and all further attempts of the court to evade, and fritter away or nullify this statute, and introduce uncertainty into the law to the infinite mischief of the public, will receive from us no assistance or countenance. It is true that there is some conflict of decision in the court of appeals, on this point. The case of the *Union Bank v. Coster*, (3 *Comst.* 204,) is in its facts in principle just like the case of *Brewster v. Silence*, and just like this case; the contract of guaranty having been made *simultaneously* with the original contract and upon the same *piece of paper*. The two cases cannot stand together; but that of *Brewster v. Silence* is the later one and must be deemed, I think, to overrule the case of *The Union Bank v. Coster*. It is true that Judge Denio, in *Gates v. McKee*, (3 *Kern.* 232,) refers to the decision in the case of *The Union Bank v. Coster*, as still in full force, but he obviously overlooked the case of *Brewster v. Silence*, which at that time, I presume, had not been reported. The case of *Gates v. McKee*, besides, turned chiefly upon other questions, and there was no occasion particularly to discuss or consider the question of the statute of frauds. We must therefore hold that the decision in *Brewster v. Silence* is still the law, and if there be any confusion or conflict

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in the decisions of the court of appeals to that court it must be left to solve the difficulty and reconcile its own decisions.

This case, upon its facts, is clearly undistinguishable from the case of *Brewster v. Silence*, as the learned referee, in his very careful and able opinion, has clearly shown ; and we cannot, therefore, do otherwise than abide by that case, and affirm the judgment.

Judgment affirmed.

[CAYUGA GENERAL TERM, June 6, 1859. *T. R. Strong, Johnson and Smith, Justices.*]

 WILLIAMS vs. VANDERBILT.

What circumstances will import a contract by an individual, as a common carrier, to transport another from New York to California ; and what will be sufficient, as evidence, when submitted to a jury, to authorize a verdict to the effect that such person held himself out as, and assumed the duty of, a common carrier.

A carrier of passengers from New York to San Francisco is bound to forward his passengers within a reasonable time ; and when it is ascertained that one of the vessels forming the line has been lost, it is his duty to provide another with all reasonable diligence.

What amounts to reasonable diligence, in such a case.

Where one undertakes, as a common carrier of passengers, to carry a passenger the whole route from New York to California, he is liable for any breach of duty as such, notwithstanding separate tickets are issued to the passenger for the different portions of the route, signed by different persons.

What are proper items of damages, in an action for the breach of such a contract by the carrier.

Although the court might have come to a different conclusion from that of the jury, on the evidence, it is not at liberty, for that reason to disturb their verdict.

THIS was an action against the defendant as a common carrier, to recover damages for his failure to transport the plaintiff from New York to San Francisco, in March, 1852. The action was tried at the Cayuga circuit, in October, 1855, before Justice T. R. STRONG, and a jury. The plaintiff re-

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covered a verdict for \$850, damages. The defendant subsequently moved for a new trial, upon a case, at a special term held in Wayne county, in July, 1857, before the same justice ; on which occasion the following opinion was delivered :

T. R. STRONG, J. "The first count in the complaint sets forth that the defendant was the owner of, and a common carrier by, a certain line of vessels and conveyances used and employed in the carriage of passengers from New York to San Francisco, by the way of Nicaragua ; and as such, on or about the 5th day of March, 1852, at New York, received the plaintiff on board of one of the vessels of said line as a passenger, to be conveyed from New York to San Francisco, by the way of Nicaragua, for certain valuable hire and reward, whereby it became the duty of the defendant, as such owner and common carrier, to convey the plaintiff to San Francisco, by the way aforesaid, as soon as he should reasonably be able to do so, without any voluntary and unnecessary delay, &c., which duty the defendant did not perform ; but, on the contrary thereof, unnecessarily and wrongfully detained the plaintiff at various places on the voyage, for the space of seventy days, or thereabouts, and wholly neglected and refused to carry the plaintiff to San Francisco, &c. ; by reason of which premises the plaintiff was compelled to and did expend, during said detentions, large sums of money for his necessary support, and was made sick and debilitated, and subjected to other inconveniences and losses, &c. . The complaint contains several other counts, but it is unnecessary to state particularly their allegations. One answer to the first count is a general denial. At the trial, evidence was given on the part of the plaintiff, tending to prove the matters of that count, except that it appeared the defendant did not own any part of the means of transportation across the Isthmus of Nicaragua, and that other persons were interested with the defendant in the ships of that portion of the line between the Isthmus and San Francisco

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The court instructed the jury, that the basis of the action was, that the defendant was a common carrier between the ports of New York and San Francisco ; that as such it was his duty to carry from New York to San Francisco all persons who purchased tickets and became passengers upon his vessels ; that it was his duty to carry them safely, and with ordinary expedition ; and that the duty of the defendant was violated in regard to the plaintiff, whereby the plaintiff had sustained damages. The jury were told that if the defendant was not such a common carrier, it would not be claimed by the plaintiff that the plaintiff was entitled to recover ; and it was submitted to the jury, upon the evidence, as the first question to be decided by them, whether the defendant was a common carrier, as alleged, with instructions as to what was essential to constitute him such. The jury were advised that if he was a common carrier, as alleged, it was his legal duty, on receiving the plaintiff on his steamer at New York, to be carried to San Francisco, to carry him by the vessels and in the mode in which he undertook to do it, with all ordinary expedition and all reasonable care, and with no unnecessary detention upon the route. The duty, however, was subject to this qualification, that if the defendant was prevented, by the act of Providence, from conveying the plaintiff in the mode in which he undertook to do it, to that extent the defendant was excused ; but he was required, in such a case, to do what he could, by the exercise of strict care and diligence, to discharge, in substance and spirit, his duty as carrier, so far as he was not so prevented. If he could not do it strictly in the manner agreed upon, he must do it in effect, according to the contract. If the plaintiff could not be carried in the vessel in which the contract said he should be conveyed, because the vessel was wrecked by the act of God, the defendant was under obligation to provide another as a substitute, as soon as it could be done by such care and diligence. If the jury should find the defendant was a carrier, it was next left to them to determine whether the de-

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fendant performed his duty as a carrier, to the plaintiff; and if they should find he did not, it was submitted to them, as the remaining question, what damage had been occasioned by the breach, to the plaintiff. In regard to the subject of damages, the jury were advised that so far as loss of time had been occasioned, by unnecessary delays and detentions, and so far as illness had resulted from unnecessary detention of the plaintiff upon the Isthmus, the jury had a right to take them into consideration; that they would regard loss of time, loss of health, and the expense resulting from it; that if the plaintiff had experienced loss of money, loss of health, detention upon the Isthmus, derangement of his plans, by reason of a violation by the defendant of an arrangement which he made, and which he assumed when he received the plaintiff on board his vessel, then they would render to the plaintiff full compensation.

The counsel for the defendants excepted to the submission to the jury of the question whether the defendant was a common carrier from New York to San Francisco; and it is now made a point, founded on that exception, that the facts relating to the undertaking of the defendant were undisputed, and that it belonged to the court to decide, as matter of law, as to the legal obligation of the defendant connected with that undertaking. The precise question intended to be raised, as I understand it, is that the tickets purchased by and delivered to the plaintiff, for the several portions of the route, were contracts between the parties issuing the tickets, respectively, on one side, and the plaintiff on the other, the construction and legal effect of which it was for the court to determine; and that their legal operation could not be varied by parol.

The ticket for the Pacific portion of the route, beyond designating the line, and route and name of the ship, the class and number of the ticket, stating that the ticket was not transferable, giving the date, and adding, "without berth," simply expresses that the plaintiff has paid for a second cabin passage in the ship, on her next voyage from San Juan del

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Sur to San Francisco, to which is the signature, "D. B. Allen, Agent, per J. Rintoul." The ticket for the Atlantic portion of the line is in similar form; and the form of the ticket for the Isthmus, beyond giving the number, stating that it is not transferable, and that it is good for the steamer of ----, adds, Mr. ---- is entitled to a passage across the Isthmus of Nicaragua, by the line of the Accessory Transit Company, baggage 15 cents per pound, no meals furnished; and is signed "Isaac C. Lea, Secretary." There is nothing in these tickets inconsistent with the defendant being a common carrier for the entire route from New York to San Francisco, and having incurred the obligations of a common carrier in respect to the plaintiff, as is claimed in the complaint. The tickets for the Atlantic and Pacific ships are in entire harmony with that view. They are dated at New York, and have the caption, "Vanderbilt's Line for California, via Nicaragua," which words, in connection with the date being at New York, import a line from New York to California. The fact of separate tickets may be referred to convenience in transacting the business. In regard to the ticket for the passage across the Isthmus, assuming that the means of transportation on that part of the route were owned and controlled by the Accessory Transit Company, the defendant may have depended, for the purpose of his line, on purchasing and using the tickets of that company, as circumstances should require. It was not essential to his being a common carrier for the entire line, that he should own, or even control, the several conveyances employed. The tickets do not purport to be full contracts in respect to the carriage of the plaintiff, or to show more than that the plaintiff has paid for and is entitled to a passage over the different portions of the route, by the conveyances specified therein, and the arrangement as to berths on the ocean steamers, and the price for baggage, and that no meals were to be furnished in crossing the Isthmus. It is necessary to go behind the tickets for passage on the ocean, to learn that the defendant issued them, and to look into the business of

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the defendant, and the circumstances of the transaction in regard to the sale and purchase of the tickets, to be able to determine the undertaking and legal obligation of the defendant as to the plaintiff. And in respect to all the tickets, I cannot perceive that they form any obstacle to the plaintiff proving that the defendant had organized a line for the entire route, and was engaged in the transportation of passengers over it as a common carrier, furnishing such tickets to passengers as evidence that they had paid their fare, and were entitled to a passage for the whole line ; such proof does not vary the tickets in terms or legal effect. It merely supplies facts essential in connection with the tickets, to show what the whole transaction was, of which the sale and purchase of the tickets was a part, and what obligations were assumed by the parties. If the defendant undertook, as a common carrier of passengers, to carry the plaintiff the whole route, he is liable for any breach of duty as such, notwithstanding the tickets ; in like manner as if the defendant's undertaking had been wholly verbal, and no ticket had been employed. There was clearly sufficient evidence tending to prove that the defendant was such a carrier, to call for the submission of the question whether he was so, to the jury ; and no exception was taken, nor is any objection now made to the instructions by the court, as to what constitutes a common carrier.

Other points made by the defendant rest on exceptions taken by him to the charge as to the obligation of the defendant. If the plaintiff could not be carried from San Juan del Sur to San Francisco by the *North America*, the vessel specified in the ticket for that branch of the line, because that vessel was wrecked by the act of God, the defendant was under obligation to provide another vessel as soon as it could be done by the exercise of strict care and diligence.

The designation, in the ticket, of a particular ship, as the ship in which the plaintiff was to have passage, would doubtless, if the vessel had not then been lost, or a loss had been subsequently occasioned by the act of God, as the destruction of

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the vessel in a storm, have entitled the plaintiff to be carried in that ship, and limited the obligation of the defendant to carry, to that ship. But I do not think the designation amounted to an absolute, unconditional contract to carry by that ship, from the obligation of which the defendant could not be relieved by such an act of God as aforesaid. (*Bonsteel v. Vanderbilt*, 21 Barb. 26.) As a common carrier, having received the fare of the plaintiff for the whole route from New York to San Francisco, and carried him from New York to San Juan del Sur, the defendant was under a legal duty to carry the plaintiff the residue of the route; and the designation in the ticket of the vessel is a mere specification of the mode in which the duty was to be performed, and to that extent controlled the duty. The duty was to carry by the vessel specified. So far as there was a contract, it was implied by the law from the duty corresponding with it, and which would be determined by whatever would determine the duty. And it is a rule well settled, that "where the law creates a duty, or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, the law will excuse him." (*Aleyn's R.* 27. *Harmony v. Bingham*, 2 Kern. 99, and cases there cited.) The right of the plaintiff to a passage by the North America, and the obligation of the defendant to carry by that vessel, therefore terminated by its becoming impossible to use the vessel on the voyage, without any fault of the defendant, by the act of Providence. It is highly probable, if not certain, upon the evidence, that the vessel had been lost when the ticket was purchased, but the plaintiff, and the defendant and his agents at New York, were mutually ignorant of the loss at that time; and if the loss had then taken place, the specification of the vessel in the ticket had no force whatever. The mistake of the parties, in supposing the vessel was in existence, rendered it wholly inoperative. Assuming, however, that the loss was afterwards, but before the arrival of the plaintiff at

San Juan del Sur, by the act of God, the specification, as has already been stated, ceased to be binding.

The exemption from obligation allowed by the law to the defendant, on account of the loss of the North America, whether the loss was before or after the purchase of the ticket, does not necessarily embrace the entire obligation he incurred; it extends only so far as is necessary for the purpose of full justice to the parties. In 1 *Parsons on Contracts*, 184, 5, it is laid down that "the non-performance of a contract is not excused by the act of God, where it may still be substantially carried into effect, although the act of God makes a literal and precise performance impossible." And in *White v. Mann*, (26 *Maine Rep.* 368,) Shepley, J., says: "The rule relied upon, that if a thing becomes physically impossible to be done, by the act of God, performance is excused, does not prevail when the essential purpose of the contract may be accomplished. If the intention of the parties can be substantially, though not literally, executed, performance is not excused. (*Chapman v. Dalton*, 1 *Plow.* 284. 1 *E. J. Cas. Abr.* 18.)" This doctrine must be limited in its application, in respect to acts occurring after a contract, to contracts which the law implies—mere legal duties. Thus an impossibility (subsequently arising from the act of God) to perform a contract made by a party, which is without any qualification determining it on that event, does not excuse from responsibility. (*Harmony v. Bingham*, before cited, and cases there referred to.) Applied to contracts and obligations created by the law, the doctrine is most sensible, salutary and just. In the present case, as is apparent from the evidence, the main object of the plaintiff in purchasing tickets was to be conveyed to California. By what particular vessels, so that they were suitable, was, and was regarded by him, of but little, if any, importance. He would as readily have purchased tickets for a passage by other vessels as by those named in the tickets he received. And the substance of the duty assumed, and intended to be assumed by the defendant, as a

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common carrier of passengers, was to carry the plaintiff to California. As such a carrier, the law required of him to provide suitable conveyances and accommodations. By what particular conveyances he should carry the plaintiff was of secondary importance in regard to his duty, and principally of moment only in respect to his convenience. The vessels named in the tickets were specified therein, because, when the plaintiff applied for tickets, they were the vessels of the line in which the plaintiff could, in the usual course of business, obtain the earliest passage. The *North America* having been destroyed when the tickets were purchased, without the knowledge of the parties, or having subsequently, before the arrival of the plaintiff at the point where he was to take passage on that ship, by act of Providence, ceased to exist, the defendant, by providing another suitable vessel to take its place, might have answered the leading purpose of the plaintiff, and complied with the spirit of his own undertaking. To that extent the right of the plaintiff, and the obligation of the defendant, remained. The plaintiff was entitled to a passage over the route, and the defendant was under obligation to furnish it as soon as it could reasonably be done, notwithstanding the loss of the vessel. The law, on account of the impossibility thus created, of employing the specified vessel, qualified the right of the plaintiff, and the obligation of the defendant, as to that vessel, but left the right to a passage, and the obligation to procure it, as soon as another vessel for the purpose could be provided, in full force. To hold the defendant discharged from all obligation, as to the rest of the route, except perhaps to refund a proportion of the passage money applicable to it, and justified in leaving the plaintiff on the Isthmus, far from home, among strangers, in an unhealthy climate, with no means of prosecuting his journey, would violate the leading intention of both parties, in the sale and purchase of the tickets, and inflict on the plaintiff the most monstrous injustice. After careful exam-

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ination and reflection, I am satisfied no error was committed in the portion of the charge under consideration.

If the views of the law of the case already presented are correct, the instructions to the jury, in respect to damages, were not, I think, erroneous. The defendant being a common carrier for the whole route, and having undertaken as such to carry the plaintiff, is liable to him for damages sustained, on account of defaults in crossing the Isthmus, as well as by reason of the default to carry the plaintiff from the Isthmus to San Francisco. The different subjects of damage mentioned in the charge—loss of time of the plaintiff, his sickness and expenses resulting from it, and the derangement of his plans, occasioned by the default of the defendant, were, I think, proper to be regarded by the jury. The expenses of his return to New York were a proper item to be considered, as he could not proceed on his route, and could not stay on the Isthmus, but was compelled to come back; and his sickness after his return home was as proper to be regarded as his sickness at any time previous. The derangement of the plaintiff's plans, mentioned near the close of the charge, obviously referred, and was understood by the jury to refer, to the breaking up of the journey, rendering it necessary for the plaintiff to return; and the full compensation in reference thereto which, it was stated, should be rendered, would naturally be understood to embrace the expenses and loss of time thereby incurred. No objection was made to the proof of any item of damage, on the ground that it was not specified in the complaint.

There was not, I think, in the rulings on the question of evidence, any substantial error committed calling for a new trial. It was proper to prove what was said between the plaintiff and Allen, the defendant's agent at New York, on the plaintiff applying to purchase a ticket; the proof of what was said by the man in the office, to whom the plaintiff was referred by persons in the office engaged in selling tickets, for information as to the character of the route, was given in support of the counts for fraud, and would have been proper,

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if the counts had been good, in like manner as if said by the defendant himself. (1 *Greenl. Ev.* § 182.) But the court afterwards decided that the plaintiff was not entitled to recover upon these counts, and directed the jury to look at the case only as presented by the other counts; and if this proof had been erroneously received, that decision and direction would have cured the error. (*People v. Parish*, 4 *Denio*, 153.) The conduct and declarations of the officers of the *Prometheus*, at Greytown, related to the question of fraud, and if of any force before, were rendered harmless by the disposition made of the subject of fraud. The evidence of the unhealthiness of the climate on the Isthmus, the sickness of the plaintiff, and the expense of living there, and the accommodations on the boats in crossing, was all relevant and material. It tended to prove the damage to the plaintiff, by the default of the defendant, in crossing the Isthmus, and the default to carry the plaintiff forward in a reasonable time on his journey.

The evidence in the case submitted to the jury applied mainly to the first count, to which no objection is made. The case was submitted to the jury as presented by that count; and the verdict of the jury manifestly was upon that count; therefore, whether the other counts are good or bad, proved or unproved, is immaterial, as the court would, if necessary, direct an amendment of the verdict in form so as to conform it to the facts.

The jury have found that the defendant was a common carrier for the whole route, and there is no proof that Drew had any connection with the line, except that he owned, jointly with the defendant, the *North America*, running in the Pacific. He was not, therefore, a necessary or proper party to the action.

It is proper to add, that the cases of *Briggs v. Vanderbilt*, (19 *Barb.* 222,) and *Bonsteel v. The Same*, (21 *Barb.* 26,) are entirely unlike the present. One of those actions was against Vanderbilt and Drew, and the other was against them and the Accessory Transit Company. They were on contract,

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and the proof failed to show a joint contract from New York to San Francisco, but did show a joint undertaking of Vanderbilt and Drew as to the passage from the Isthmus to San Francisco; and as to that, it was held, in each case, the plaintiff was entitled to recover back the amount of passage money paid by him with interest. In those cases, as appears by the opinion of the court in the first, (*p.* 239,) the complaint was not regarded as so framed as to present some of the principal questions in this case.

The court cannot, upon the evidence, interfere with the verdict, on the ground the damages are too high.

A new trial must be denied."

From the judgment entered at the special term in accordance with the above opinion, the defendant appealed to the general term.

Wm. Clark, for the appellant.

George Rathbun, for the plaintiff.

By the Court, E. DARWIN SMITH, J. Upon the question whether the defendant was a common carrier of passengers from New York to San Francisco, I think the verdict of the jury warranted by the evidence, and clearly right. It is not claimed that the law was not correctly stated to the jury by the circuit judge; and if it be true, as the counsel for the appellant claims, that the facts being undisputed, it was for the court to expound or interpret the contract, yet if the jury have found as the judge would have been bound to hold, no injury has been done to the defendant. The question remains, under the charge of the judge, in respect to the law, whether the verdict was right or erroneous, on this question. The action was not one on contract, where, as a general proposition, it is the duty of the court to construe and interpret the contract, but upon the duty on the principle of the old action on the case.

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The advertisement of the line as "Vanderbilt's line between New York and San Francisco," giving the names of the ships on the Atlantic and the Pacific, and stating that "From San Juan De Nicaragua passengers would be promptly conveyed over the new transit route of the Nicaragua Company, having but twelve miles of land transportation, and at that point embark in one of the above named Pacific steamers for San Francisco;" and directing persons seeking passage to "apply only at the office of the line, No. 9, Battery Place;" with proof of the application by the plaintiff at *that place* for a passage to San Francisco, where over the door of the office he found a sign of "Vanderbilt's line for California," or "Vanderbilt's through line to California;" and where he received for the *entire* sum of \$250, two tickets headed as follows, "Vanderbilt's line for California, via Nicaragua," one for the Atlantic and one for the Pacific steamer—with a third ticket for the transit route; with proof that the defendant owned the Atlantic steamers and was part owner of those upon the Pacific—all taken together, imported, in my opinion, a contract by the defendant, as a common carrier, to transport the plaintiff from New York to California; and were entirely sufficient, as evidence, when submitted to the jury, to authorize a verdict to the effect that the defendant held himself out as, and assumed the duty of, a common carrier for the entire distance.

In the case *Quimby v. Vanderbilt*, (17 N. Y. R. 310,) quite similar to this, the evidence was submitted to the jury to imply a contract, and this course was sanctioned by the court of appeals. The propriety of such a disposition of the cause on this point, at the circuit, is, I think, hardly an open question. It being settled, therefore, that the defendant was a common carrier from New York to San Francisco, it follows that he was bound to forward the plaintiff within a reasonable time, and when it was ascertained that one of the vessels on the Pacific was lost, it was his duty to provide another with all reasonable diligence.

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Upon the assumption that the defendant was a carrier for the whole distance, this proposition, I suppose, can hardly be disputed. (*Beebe v. Johnson*, 19 *Wend.* 500. *Harmony v. Bingham*, 2 *Kern.* 99.) If it was the duty of the defendant thus to provide some new conveyance to transport the plaintiff from San Juan Del Sud to San Francisco, after the loss of the North America, we come then to the chief question of fact that remains. Did the defendant exercise all reasonable diligence in providing another vessel to take the plaintiff to California? This is the precise question submitted by the circuit judge to the jury, and which the jury, in finding a verdict for the plaintiff, have necessarily answered in the negative. Is this verdict clearly against evidence, or the weight of evidence? On this question of fact it seems to me the evidence was not very strong or conclusive. It was, however, purely a question for the jury. It was very fairly submitted to them. The charge of the judge was very guarded, careful and unexceptionable, and although we might have come to a different conclusion from that of the jury on the evidence, we are not at liberty, for that reason, to disturb the verdict. (27 *Barb.* 540.)

As respects all other questions and exceptions raised in the case, they have been so fully considered and discussed by the judge at special term, that I do not deem it expedient to examine them in detail, concurring as I do fully in the opinion then delivered.

The judgment of the special term, I think, should be affirmed.

Judgment affirmed.

[CAYUGA GENERAL TERM, June 6, 1859. *T. R. Strong, Johnson and Smith, Justices.*]

PICKETT *vs.* BARRON and wife, and others.

A subsequent assignee of a bond and mortgage, for a valuable consideration paid at the time, and whose assignment is first recorded, has a perfect title to such bond and mortgage, under the statute, as against a prior assignee thereof, the assignment to whom is not recorded.

To constitute a *bona fide* purchaser, within the meaning of the recording acts, the party receiving the subsequent conveyance must not only have received the same without notice of the prior unrecorded deed, but he must have received the same upon some *new consideration*, advanced at the time, or must have relinquished some security for a pre-existing debt due him.

And when a party has obtained the legal title, if he has paid but a part of the consideration or value of the property—the residue of such consideration being a pre-existing debt—he is to be considered a *bona fide* purchaser, *pro tanto*, only.

ON the 24th day of July, 1855, the defendant Louis Barron executed his bond to Mary Tower, for the sum of \$200, and to secure the payment thereof, he, on the same day, with his wife, the other defendant, executed to said Mary Tower a mortgage on real estate in the city of Rochester. This mortgage was recorded in Monroe county clerk's office on the day of its execution. On the 30th day of January, 1856, Mary Tower sold and assigned this bond and mortgage to Elias Pond, for a valuable consideration, and at the time of the assignment, Louis Barron certified in writing that the bond and mortgage were valid, and that there was no defense thereto. On the 23d day of May, 1857, Elias Pond sold and assigned the same to John Greig; and on the same day, Greig assigned the bond and mortgage to Mary E. Barron, the wife of Louis Barron. This last assignment was never recorded; and according to the report of the referee it was understood by Barron and his wife, and Greig, that the same should not be recorded. Prior to the execution of the mortgage, the premises were conveyed to Mrs. Barron, by her husband, or by his procurement. On the 16th day of July, 1857, John Greig sold and assigned this bond and mortgage to the plaintiff, as collateral security for the payment of the sum of \$177.68. This action was brought to foreclose the mortgage, and the complaint contained

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the usual averments in such cases, and stated among others the above facts. The defendants, Louis Barron and his wife, answered separately. Mary E. Barron alleged that John Greig, on the 23d day of May, was the owner and holder of the bond and mortgage, and the moneys due and to grow due thereon; that he on that day sold and assigned the same to her, and that since that time she has been and now is the owner and holder thereof. Louis Barron, in his answer, alleged that on the 23d day of May, 1857, he paid to Elias Pond, the then holder and owner of the bond and mortgage, the money due thereon. The issues made by these pleadings were referred, for trial, to the Hon. Addison Gardiner. He found "that the consideration of the assignment of the bond and mortgage, from Greig to the plaintiff, was \$100 in money, and the balance of the sum mentioned in said assignment, \$77.68, consisted of an account for money lent and for groceries delivered to said Greig, and to one Studley, which was then and there received and had by said Greig." He also found that the plaintiff made the advances and received the assignment of the bond and mortgage in good faith and without notice of any claim thereto in behalf of any other person. And he found, as conclusions of law, from the above facts, that the bond and mortgage were a valid security in the hands of the plaintiff for \$177.68 and interest; and that the plaintiff was entitled to judgment for that sum, with costs. From the judgment entered at a special term, upon this report, the defendants appealed.

A. Lathrop, for the appellants.

G. F. Danforth, for the plaintiff.

By the Court, E. DARWIN SMITH, J. The assignment by Greig to the plaintiff, of the bond and mortgage in controversy in this action, was a gross fraud. Whether or not the plaintiff can maintain his title to such bond and mortgage,

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acquired by such fraud, is the question arising on this appeal. At the time of the assignment, the bond and mortgage actually and equitably belonged to the defendant Mary E. Barron, but the assignment to her was not recorded. The statute (2 R. S. 40, § 1, 3d ed.) declares "that every unrecorded conveyance shall be void, as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, whose conveyance shall be first duly recorded." The plaintiff's assignment was first recorded, and section 69 of the statute declares that the term "*purchaser*," as used in that statute, shall be construed to embrace "every assignee of a mortgage." The assignment from Greig to the plaintiff purports, upon its face, to have been made "as collateral security for \$177.68." The referee finds, and the proof clearly justified the finding, that \$100 in cash was advanced at the time of the assignment, in consideration thereof, and that the \$77.68 was for a pre-existing debt of Greig and one Studley to the plaintiff. The referee also finds that the plaintiff made the advance and took the assignment in good faith and without notice of any other claim to the bond and mortgage; and this finding on this question of fact is fully warranted by the evidence. The plaintiff, therefore, has an assignment of this bond and mortgage in due form from the apparent owner, as appeared from the record, together with the possession of the bond and mortgage itself, and is a subsequent purchaser in good faith, for a valuable consideration, and his conveyance is first recorded. His title to the bond and mortgage is therefore perfect under the statute.

But the plaintiff is not a *bona fide* purchaser, except as to the \$100, advanced at the time of the assignment. So far as relates to the \$77.68, that was a past consideration, and the equity of Mrs. Barron is superior to his. To constitute a *bona fide purchaser* within the meaning of the recording acts, the party receiving the subsequent conveyance must not only have received the same without notice of the prior unrecorded

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deed, but he must have received the same upon some *new consideration* advanced at the time, or must have relinquished some security for a pre-existing debt due him. (*Dickerson v. Tillinghast*, 4 *Paige*, 222. *Stuart v. Kissam*, 2 *Barb.* 493. *Wood v. Chapin*, 3 *Kern.* 509.)

And when a party has obtained the legal title, if he has paid but a part of the consideration or value of the property, he is entitled to be considered a *bona fide* purchaser *pro tanto*. (*Peabody v. Fenton*, 3 *Barb. Ch.* 498. *Stalker v. McDonald*, 6 *Hill*, 96.) The case last cited, it is true, was the case of a promissory note. But the analogy between the case of a person claiming the rights of a *bona fide* holder of negotiable paper and a person claiming to be a subsequent purchaser for a valuable consideration, under the recording acts, is quite perfect, and there is no reason why the rule of law should not apply to them alike.

So far as the plaintiff took this bond and mortgage as a security for the debt of Greig and Studley, he is in no worse condition than he was before, and his equity is not superior to that of Mrs. Barron. Her prior equitable title and rights should prevail, except so far as the protection of the statute in express terms extends to the plaintiff as "*a subsequent purchaser in good faith and for a valuable consideration*;" that is, so far as a new consideration was presently paid or advanced in consideration of the transfer of such bond and mortgage. The referee therefore erred, so far as he directs judgment for the plaintiff for all of the plaintiff's claim exceeding \$100 and interest thereon; and the judgment is so far erroneous. I am by no means sure that the assignment of the mortgage to Mrs. Barron did not merge the equitable into the legal estate so that nothing of interest in the mortgage remained capable of assignment to the plaintiff. But as this point was not raised before the referee, or considered by him, or particularly discussed here, I do not think it proper for the court now to pass upon that question. I think there should

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be a new trial, and as neither party has entirely succeeded, neither party should have costs of the appeal.

New trial granted.

[CAYUGA GENERAL TERM, June 7, 1859. *T. R. Strong, Johnson and Smith, Justices.*]

A. & J. W. JOBBITT vs. GOUNDRY & HURD.

A clause in a bill of lading, which directs the carrier to collect the freight of the consignee of the goods, on delivery, does not oblige the carrier to withhold the delivery of the goods in case of the refusal of the consignee to pay the freight; and if the carrier delivers the goods to the consignee without requiring him to pay the freight, or if he fails or neglects to collect the freight from him, this will not discharge the liability of the consignor, to him, for it, nor constitute any defense to an action for such freight.

The taking of a check from the consignor, by the carrier, for the amount of the freight, and giving a receipt acknowledging the payment of the freight, will not amount to a satisfaction of the carrier's claim for freight, as against the consignor, where the drawer has no funds in the bank, to meet the check; unless it is fairly inferable, from the evidence, that the carrier agreed the check should be received as payment.

THIS action was tried at the Chemung circuit in September, 1858, when the following facts were established, viz. The plaintiffs ran a canal boat, in 1857, on the canals and lakes of this state, and were common carriers of merchandise. As such carriers, they transported, on their canal boat, some lumber, barley and apples for the defendants, from Dresden to Albany. When the plaintiffs received the property on board of their boat, they took a shipping bill, signed by the defendants, which stated that the plaintiffs had received \$180 towards the freight; and that the captain of the boat was to deliver the property to E. Dorr, at Albany, and collect the balance of the freight. One of the plaintiffs gave the defendants a receipt for the property, which contained a statement similar to the one in the shipping bill.

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The plaintiffs delivered the property on the 30th day of November, 1857, to E. Dorr, at Albany, who then claimed that he had no money with which he could pay the freight that was due the plaintiffs. He gave them his check, dated the 1st day of December, 1857, on the Union Bank of Albany, for \$146.76, which was the balance of the freight due the plaintiffs; but he had no funds in the Union Bank. At the time Dorr gave his check to the plaintiffs he took a receipt, signed by the one who transacted the business, showing that the freight was paid. The defendants had previously advanced the freight to Dorr; but the plaintiffs did not know that fact. The plaintiffs indorsed and transferred Dorr's check, on the day it bore date, but it was not paid; and they were sued on it as indorsers, and then paid it and took it from the holder. They afterwards brought this action to recover the freight for which they had taken Dorr's check. It was defended principally on two grounds; 1st, that the plaintiffs should not have delivered the property to Dorr, unless he paid them the freight on it; 2d, that the defendants were not liable to pay the freight to the plaintiffs, because they had advanced the same to Dorr, and the plaintiffs had taken his check therefor. The plaintiffs produced Dorr's check at the trial; but the case does not show that they offered to cancel it, or tendered it to the defendants.

The defendants' counsel moved for a nonsuit; but the case does not show on what grounds, or that any were stated; which motion was denied; whereupon the jury, by direction of the judge, found a verdict in favor of the plaintiffs for \$155.87, (which was the amount of the check and interest thereon,) subject to the opinion of the court at general term.

The plaintiffs moved for judgment upon the verdict.

J. McGuire, for the plaintiffs.

B. W. Franklin, for the defendants.

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By the Court, BALCOM, J. It was held, in *Shepard v. De Bernales*, (13 East, 565,) that the usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, *he or they paying freight for the goods*, is introduced for the benefit of the master only, and not for the benefit of the consignor; and that therefore the master is not bound to the consignor to withhold the delivery of the goods, unless the consignee or his assigns pay the freight. And it seems to be established that a clause in a bill of lading, which directs the carrier to collect the freight of the consignee of the goods, on delivery, does not, in case of the carrier's neglect to collect of him, discharge the consignor's liability to pay the same. (*Collins v. The Union Trans. Co.*, 10 Watts, 384. *Angell on Carriers*, § 397.) It follows that the delivery of the defendants' goods to Dorr, by the plaintiffs, without requiring him to pay the freight thereon, or the neglect or failure of the plaintiffs to collect such freight of him, does not affect the defendants' liability to them for it; and that such facts constitute no defense to this action.

The defendants' counsel insists that the taking of Dorr's check, by the plaintiffs, when the goods were delivered, under the circumstances disclosed by the evidence, was a satisfaction of the plaintiffs' claim for the freight, as against the defendants. The check did not operate as a satisfaction of the claim, unless the fair inference from the evidence is that the plaintiffs agreed that it should be received as payment of it. (*Noel v. Murray*, 3 Kern. 167. *Davis v. Allen*, 3 Comst. 168. *Vail v. Foster*, 4 id. 312.) And it seems to me to be very clear that the plaintiffs could not have supposed the check was to operate as payment of the freight, unless the Union Bank should pay it when presented. It is absurd to say that a creditor regards his demand as paid, when he receives a check for it from his debtor, on a bank. I think, in ordinary transactions, the creditor has not the least idea that his demand is paid, though he may receipt it as paid, upon receiving the check of the debtor or of a third person, on

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a bank, for the same. He cannot be supposed to regard the check as payment, or as a satisfaction of his demand, when the drawer has no funds in the bank to meet it, and the bank refuses to honor it. And in this case, I am of opinion the evidence does not warrant the conclusion that the plaintiffs received Dorr's check, in satisfaction of their claim against the defendants for the freight, whether it should be paid by the bank or not; but that the fair inference from the evidence is that it was not agreed it should so operate unless the bank should pay it on presentation. (*See 5 Wend. 490.*)

The defendants' counsel now claims that the verdict was improperly ordered for the plaintiffs, for the reason that the plaintiffs did not cancel or surrender the check to the defendants at the trial. This position is sufficiently answered by the fact that no such objection was taken at the trial, where it could have been obviated.

I am of opinion, for the foregoing reasons, that the plaintiffs are entitled to judgment on the verdict, with costs.

Decision accordingly.

[OTSEGO GENERAL TERM, July 5, 1859. *Mason, Balcom and Campbell, Justices.*]

ACKLEY and wife vs. TARBOX & WEBSTER.

Husband and wife cannot maintain an action in their joint names, to recover for the conversion of the separate property of the wife. In such a case the wife must sue alone.

APPEAL from a judgment of the county court of Otsego county, affirming the judgment of a justice of the peace.

By the Court, MASON, J. This action originated in a justice's court. The action was brought to recover the value of

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a cow, the separate property of Mrs. Ackley, one of the plaintiffs, and alleged to have been converted by the defendants. The plaintiffs are husband and wife, and bring this action in their joint names. The complaint charges that the defendants broke and entered upon the premises and close of the plaintiffs in their possession being, and then and there took and carried away one cow, of the value of \$50, the property of Demarias Ackley, one of the plaintiffs, and the wife of the other plaintiff, Warren Ackley, and converted the same to their own use. There is a general denial in the answer, amongst other defenses set up, which it is not necessary to notice. The plaintiff recovered a judgment for \$40 damages and \$10.09 costs, which, on appeal, was affirmed by the county court of Otsego county. After the plaintiffs had rested, the defendants moved for a nonsuit, upon the ground, amongst others stated, that this action cannot be maintained in the joint names of the plaintiffs; that the wife should have brought the action in her own name alone. The motion was denied. The defendants had the right to raise this question, of the alleged defect of parties plaintiffs, on a motion to nonsuit.

They could not demur for such a defect, in a justice's court. The code only allows a demurrer in a justice's court when the pleading is not sufficiently explicit to enable the party to understand it, or when it contains no cause of action or defense. (*Code*, § 64, *sub.* 6.) The question is presented, therefore, for our adjudication, whether the husband and wife can maintain an action in their joint names to recover for the conversion of the separate property of the wife. The question is one which seems to have greatly perplexed the judicial mind of the state, and in regard to which there is much conflict of decision. This series of conflicting decisions, running from the very commencement of our new system of pleading and procedure, seems to have involved this subject in great obscurity and difficulty, which even the attempts of the legislature have not proved successful to remove. We have never

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decided this question in general term in this district. It is proper, therefore, that we should consider it. This question has become of more importance since the passage of the acts of 1848 and 1849 for the more effectual protection of the property of married women, as it involves a large and constantly increasing class of cases heretofore unknown. The wife under these statutes may take and hold property and dispose of it, the same as if she were unmarried. In this respect she is entirely freed from the disability of coverture which the common law has thrown around her. The 114th section of the code, as it now stands, and as it stood when this suit was tried, declares that "when a married woman is a party, and the action concerns her separate property, she may sue or be sued alone." In the case of *Van Buren and wife v. Cockburn*, (2 *Code Rep.* 62,) which was an action of ejectment brought in the joint names of husband and wife to recover the separate real estate of the wife, it was held that the words, "may sue alone," are not to be construed as "must sue alone," and that a demurrer would not lie for a misjoinder of parties because of the husband being joined. In the case of *Ingraham and wife v. Baldwin*, (12 *Barb.* 10,) which is a general term decision, in an action of ejectment, Judge Willard, in delivering the opinion of the court, in passing, throws out the same idea, and expresses the opinion that in such action the husband may properly be joined. He bases his opinion, however, upon the idea that the husband was seised in the right of his wife of a life estate, as tenant by the curtesy initiate, and the wife was seised of the fee. The case is not authority, for the reason that the point was not in judgment in the case, and the case was decided on other grounds; and I am entirely clear that Judge Willard's reason for making the husband a party in that particular is unsound, and cannot be supported.

In the case of *Willis v. Underhill*, (6 *How. Pr. R.* 396,) Justice Roosevelt held that where the suit affects alone her separate property, a married woman may sue alone; but in

the subsequent case of *Rusher and wife v. Morris and wife*, (9 *How. Pr. R.* 266,) he decided, on demurrer to the complaint, that she might very properly join her husband with her in the action, and that there is nothing illegal in her so doing; holding that the expression, "may sue alone," does not mean that she must do so. And he uses the emphatic expression, that "he is not disposed to adopt, either as a consequence of the code or of the acts for the better protection of their rights, the harsh rule that a married woman must be turned out of court merely because she comes into court arm in arm with her husband." Justice Hand says, in the case of *Howland v. The Fort Edward Paper Mill Co.* (8 *How. Pr. R.* 505, 512,) that in all cases in which the wife sues or is sued by a stranger, in respect of her separate property, her husband should be a party plaintiff or defendant, unless he is civilly dead; but the case is more characterized by the citation of cases that do not decide the point than it is by any reasons assigned, or by any description of the provisions of the code, and seems to be a kind of general digest of cases. In the case of *Brownson and wife v. Gifford and others*, (8 *How. Pr. R.* 389,) Judge Harris has fully considered this question on a demurrer to the complaint, where the husband was joined with the wife in an action for the partition of her separate property, and he holds that the husband cannot be joined. The case is well considered, and *Van Buren v. Cockburn* (2 *Code Rep.* 63) is expressly overruled. The question is elaborately considered by Judge Hoffman of the superior court of New York, in *Smith v. Kearney and others*, (9 *How. Pr. R.* 466,) in which he repudiates the decision of Judge Roosevelt, in *Rusher v. Morris*, (9 *How. Pr. R.* 266,) and holds that the husband cannot be joined with the wife in such a case. This opinion is well reasoned, and to my mind convincing; and is a clear exposition of the code and the former practice in equity. In speaking of this 114th section of the code, he says: "It is now provided that when a married woman is a party, her husband must join with her, except when the

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action concerns her separate property she may sue alone ;” and that “when the action is between her and her husband, she may sue or may be sued alone.” He adds : “This last clause is unmeaning, unless the words, ‘may sue alone,’ in the above preceding clauses, mean simply that she is to sue alone without her husband, and the husband cannot be joined with her.” These cases are all reviewed by Van Santvoord in his admirable work on *Pleading*, (see pages 99 to 105,) and the latter cases approved and the former disapproved ; and he is greatly strengthened in his conclusion by a reference to the former practice in equity. It was the settled equity practice before the code, that a suit in relation to the wife’s separate property, when the interests of husband and wife were in conflict, could not be brought in the names of both husband and wife. The action in the name of husband and wife was regarded as the suit of the husband alone ; and the wife being entitled to her separate action in respect to her separate property, such action in the name of husband and wife would not preclude her from bringing another action by her next friend ; and consequently it was held that her husband ought not, and could not, be joined when the action concerned her separate property, and his interest seemed to conflict with hers. (*Story’s Eq. Pl.* §§ 61, 62 and 63, and notes. 2 *Ves. R.* 458. 7 *Sim. R.* 239. 1 *Sim. & Stu.* 185. 6 *Barb.* 404. 3 *Barb. Ch. R.* 399. 9 *Paige*, 255. 10 *id.* 193. 2 *Barb. S. C. R.* 493.) In *Stuart v. Kissam*, (2 *Barb. S. C. R.* 493,) which was a bill in equity under the old practice, for the purpose of enforcing a bond and mortgage held by the defendant in trust for one of the plaintiffs, a married woman, as her separate property, the court said the suit should have been brought in the name of the wife alone ; that a suit in the name of husband and wife, in relation to the wife’s separate property, is so far considered the suit of the husband as that a decree made in it adverse to the wife’s claim, will not bar her from a subsequent suit in her own name, by her next friend, for the same matter. Precisely the same doctrine was held by Chancellor Walworth,

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in the case of *Grant v. Van Schoonhoven*, (9 *Paige*, 255,) and reaffirmed in *Bowers v. Smith*, (10 *id.* 201.) To the same effect is *Ashton and wife v. Jones*, (3 *Barb. Ch. R.* 399,) and *Sherman and wife v. Burnham*, (6 *Barb.* 403.) The former was a bill in equity to set aside a will, in which the husband and wife, having conflicting interests, joined as complainants, and the chancellor held that they were improperly joined. In the latter case of *Sherman and wife v. Burnham and others*, which was a bill in equity, before the code, against the trustees of the wife's separate estate, to remove them, and that they account, the supreme court, on appeal, held that the suit should have been brought by the wife alone, by her next friend, and that the husband was improperly joined as a plaintiff. These principles and rules are fully applicable to the system of pleading contained in the code, and the 114th section does no more than enact what was the equity rule in regard to parties in this respect before the code. It provides just what the equity rule was before—that when a married woman is a party, her husband must be joined with her, except when the action concerns her separate property, and except when the action is between husband and wife, and declares that when the action concerns her separate property, she may sue alone. I am of opinion, for the reason stated, that in actions concerning her property the wife must sue alone, and cannot join with her husband; and it follows, that both the judgment of the county court and that of the justice must be reversed. It is unnecessary, therefore, to examine the other questions in the case.

Judgments reversed.

[OTSEGO GENERAL TERM, July 5, 1859. *Balcom, Campbell and Mason* Justices.]

E CHADWICK vs. W. J. LAMB.

Where personal property, which is mortgaged, has been wrongfully converted, an action to recover its value may be maintained by the mortgagee, although the money secured by the mortgage is not yet due, if there is a clause in the mortgage which authorizes the mortgagee, at any time he shall deem himself insecure, to take possession of the mortgaged property and sell it, to satisfy the debt.

When a creditor takes a chattel mortgage, to secure the debt due to him, he acquires thereby not only the right to the possession of the mortgaged property, but every interest in it that the mortgagor had, except the mere equity of redemption.

In an action by a second mortgagee of chattels, against a prior mortgagee claiming under a usurious mortgage, to recover for a wrongful conversion of the property, the plaintiff will be regarded as having only a special interest in the property, and he can recover only the value of that special interest, viz. the amount *remaining due* upon his mortgage.

ON the last of December, 1855, or the fore part of January, 1856, Charles Chadwick desired to borrow about \$300; and for that purpose he executed a mortgage on personal property in Harpersfield, Delaware county, for the payment of \$300, with interest, to Sheldon A. Givens, one month from the date of the mortgage. An arrangement was made, when Givens took this mortgage, between him and Chadwick, that Givens should, as the friend of Chadwick, sell and assign the mortgage to the defendant for \$265 or \$270, as a valid security for \$300, if he (Givens) could do so, by concealing from the knowledge of the defendant the purpose for which the mortgage had been given. Afterwards, in the month of January, 1856, Givens sold and assigned the mortgage to the defendant for \$265 or \$270, then paid by the latter to the former, in money, as a valid security for \$300 and interest thereon from the date of the mortgage, and without disclosing to the defendant for what purpose the same had been taken by Givens. The defendant then caused the mortgage to be duly filed in the proper town clerk's office.

Prior to the 31st day of December, 1856, said Charles Chadwick had been in partnership with the plaintiff, who

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was his brother ; but they had dissolved their copartnership, and Charles had agreed with the plaintiff to pay their partnership liabilities, amounting to \$361.52 ; and the plaintiff knew, on and before the 31st of December, 1835, that Charles had executed the above mentioned mortgage to Givens, and that he had assigned it for \$265 or \$270 to the defendant, who held it, supposing it to be a valid security in his hands for \$300 and interest thereon. But notwithstanding this knowledge, the plaintiff and said Charles, on the day last mentioned, with the hope of preventing the defendant from collecting said mortgage, by a sale of the property therein mentioned, made an arrangement by which the plaintiff should pay their aforesaid joint liabilities ; and the plaintiff then gave Charles a receipt, in which he agreed to pay their said joint liabilities ; and Charles gave the plaintiff his promissory note for the payment to him or bearer of the sum of \$361.52, one year from its date, with interest. Charles also then executed and delivered to the plaintiff a mortgage on the same personal property mentioned in the mortgage he had given to Givens, to secure the payment of said note to the plaintiff, on or before the 31st day of December in the following year. And this mortgage contained a clause which authorized the plaintiff, at any time he should deem himself insecure, to take possession of the mortgaged property, and to sell the same at public or private sale to satisfy said note, the interest thereon and costs.

After this mortgage was given to the plaintiff, and within one year after the filing of the mortgage which Givens had assigned to the defendant, the defendant took from the possession of Charles Chadwick, and sold, a portion of the mortgaged property, by virtue of the authority contained in the mortgage he held, and applied the avails of such property in payment of such mortgage. The plaintiff forbade the defendant selling the property, and brought this action for the conversion thereof by the defendant, to recover its value, without demanding it of him, and before the plaintiff's mortgage be-

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came due. Charles Chadwick had paid over \$150 on the plaintiff's mortgage soon after it was given.

The action was tried at the Delaware circuit in August, 1858. The plaintiff claimed to recover the value of the property, under and by virtue of the mortgage he took from his brother Charles; and the defendant justified the sale he had made of the property, and claimed he had the right to take the same from the possession of the mortgagor and sell it, under and by virtue of the mortgage he purchased of Givens. Charles Chadwick directed the bringing of the action, and testified that he had before made up his mind to defeat the defendant's mortgage. But he also stated that the action was brought for the benefit of the plaintiff to the amount of what was unpaid on the note he gave him, and that the rest was for his own benefit. He subpoenaed the witnesses for the plaintiff with his own money. The defendant's counsel requested the judge to charge the jury that if Charles Chadwick made, executed and delivered the mortgage of \$300 to Sheldon A. Givens, and made him his agent to sell the mortgage for the best price he could obtain, and Givens, as such agent, sold the mortgage to the defendant for \$265, or any other sum less than its face, without communicating to the defendant the purpose for which it was made, then and in that case the mortgagor, and the plaintiff claiming under him, were estopped from setting up usury. But the judge refused so to charge, and the defendant's counsel excepted. The defendant's counsel also asked the judge to charge the jury and decide, that the plaintiff, having taken his mortgage with knowledge of the defendant's mortgage, could not set up usury in the defendant's mortgage; which the judge declined to do, and the defendant's counsel excepted. The defendant's counsel asked the judge to charge the jury and decide, that the plaintiff's mortgage not being due at the time the action was brought, he could not recover; which the judge declined to do, and the defendant's counsel excepted. The defendant's counsel requested the judge to charge the jury that the plaintiff was not

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entitled to recover an amount exceeding what was due on his mortgage; which the judge refused to do, and the defendant's counsel excepted.

The judge charged the jury, in substance, that the Givens mortgage having been sold by him at a discount, became and was thereby rendered usurious and void, and the plaintiff was therefore entitled to a verdict for the value of the property in question. To which charge the defendant's counsel excepted.

The jury rendered a verdict in favor of the plaintiff for \$250. The defendant moved for a new trial, on a bill of exceptions.

William B. Champlin, Jr., for the plaintiff.

F. R. Gilbert, A. Becker and Henry R. Mygatt, for the defendant.

By the Court, BALCOM, J. The action was not prematurely brought; and the judge properly refused to charge the jury that the plaintiff could not recover, because his mortgage was not due at the time the action was commenced. This court decided, at the October term, 1846, at Rochester, in *Balcom v. Clarke and Johnson*, (*MS. opinion, per Beardsley, J.*) that where personal property, which is mortgaged, has been wrongfully converted, an action to recover its value may be maintained by the mortgagee prior to the time the mortgage becomes due, if there is a clause in the mortgage which authorizes the mortgagee to take possession of the property and sell it, to satisfy the debt secured by the mortgage, at any time he shall deem himself insecure. That case was correctly decided, for the reason that such a mortgage transfers the title to the property to the mortgagee, at the time it is executed; and he has the right to the possession of it at any time he deems himself insecure. And an action for the conversion of personal property, formerly called trover, can be maintained by one who has the right to the possession at the time of the conversion. (1 *Cowen's Tr.* 284, 2d ed. *Shuart v. Taylor*, 7 *How. Pr. R.* 251.) When the plaintiff took his

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mortgage, he acquired not only the right to the possession of the property in question, but every interest in it that the mortgagor had, except the mere equity of redemption. (*Mattison v. Baucus*, 1 *Comst.* 295. *Hill v. Beebe*, 3 *Kern.* 565.)

The judge erred in refusing to charge the jury that the plaintiff was not entitled to recover an amount exceeding what was due on his mortgage. It was decided in *Spoor v. Holland*, (8 *Wend.* 445,) that in trover by a party having a special property in goods, against one claiming under the general owner, the plaintiff is entitled to recover only the value of the special interest. And this rule is well settled. (See 21 *Wend.* 300; 7 *Cowen*, 670; 3 *Denio*, 33.) The defendant in this action is not a mere stranger to the question of title to the property in dispute; for he held a mortgage on it, older than the plaintiff's, from the original owner, under whom the plaintiff claims title to it. Satisfy the plaintiff's mortgage, and his claim to the property will be extinguished. His interest in the property should be regarded as special in this action, and that of the defendant general. This court has held at general term in this district, in *Wood v. Combs*, (*MS.*) and in other cases, that the mortgagee of personal property will not be permitted to recover beyond the sum due upon his mortgage, in an action against a creditor of the mortgagor, who seizes and sells the mortgaged property, by virtue of an execution against the mortgagor while he has the possession, after the mortgage becomes due. (See 3 *Denio*, 33.) Those decisions were based upon the principle that holds such a levy and sale good as against the *mortgagor*.

The above mentioned error of the judge entitles the defendant to a new trial. I will not, therefore, discuss any other question in the case.

The verdict must be set aside, and a new trial granted; costs to abide the event.

Decision accordingly.

[OTSEGO GENERAL TERM, July 5, 1859. *Mason, Balcom and Campbell, Justices.*]

PERKINS *vs.* STEBBINS.

Notwithstanding the defendant, in a suit before a justice of the peace, fails to appear at the trial, the plaintiff must establish his cause of action by legal evidence.

Evidence that one is reputed to be the agent of another, is incompetent testimony to establish an agency and thus charge the alleged principal.

THIS action originated in a justice's court. It was brought to recover for money lent, horse keeping, board, &c. The plaintiff called James F. Perkins as a witness, who testified as follows: "I know the parties; I am son of the plaintiff in this suit; plaintiff resides in this place; keeps a public house. I have seen Franklin Stebbins, and know him; Franklin is agent of Almus Stebbins, and does business as such agent for Almus Stebbins, and has been reputed as such agent. I let the defendant have six or seven dollars, in June last, as agent of my father. I saw the plaintiff let Franklin Stebbins have six or seven dollars, for the defendant, some time the fore part of October last. The money I let the defendant have, I let him have at Homer village. I know of his having his dinner and a peck of oats for his horse. Franklin had them as agent for the defendant. I was at the time tending bar, and the stable too, for my father. Oats worth two shillings; dinner worth two shillings." The above was all the testimony given on the trial. And thereupon the justice rendered a judgment in favor of the plaintiff for \$13.50 damages, and \$5.05 costs. The Cortland county court affirmed the judgment; and the defendant appealed to this court.

Geo. A. White and H. Ballard, for the plaintiff.

O. Porter, for the defendant.

By the Court, BALCOM, J. The judgment of the justice cannot be sustained, unless the plaintiff established his cause

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of action by legal evidence, although the defendant was not present at the trial. (13 *Wend.* 85. 14 *id.* 159. 1 *Denio*, 432. 4 *id.* 184, 460.) Evidence that Franklin Stebbins was reputed to be the defendant's agent, was clearly incompetent. The witness did not state what kind of business, if any, outside of the matter in controversy in this action, Franklin had done as agent of the defendant; and when he said he knew Franklin was agent of the defendant, he merely stated a conclusion, which may have been drawn from what third persons had said, or from what Franklin himself had said and done. The evidence was clearly insufficient to show that Franklin had authority to borrow money as agent of the defendant. The justice erred in giving judgment against the defendant for the money, oats and dinner Franklin had of the plaintiff. It is therefore unnecessary to determine any other question in the case. The judgment of the county court, and also that of the justice, must be reversed, with costs.

Decision accordingly.

[OTSEGO GENERAL TERM, July 5, 1859. *Mason, Balcom and Campbell*, Justices.]

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To constitute a personal obligation upon a party taking a conveyance of lands incumbered by a mortgage, binding him to the absolute payment thereof, something more is requisite than a mere statement, in the deed, that the conveyance is made subject to such mortgage.

To create such a liability on the part of the grantee, the language of the deed should be, either "subject to the payment" of the outstanding mortgage; or, that such mortgage "forms a part of the purchase money, which the grantee in the deed assumes to pay;" or some equivalent expression which clearly imports that an obligation is intended to be created by one party, and is knowingly assumed by the other.

In all the cases in which a party succeeding to the rights of another, in property, has been personally charged with the duties resting upon his prede-

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cessor, an agreement, express or implied, has been relied upon. In some instances, the assumption of the obligation has been by an express agreement, and in others it has been implied from the terms of the deed, or the circumstances of the transaction and the acts of the parties; but in no case has a party been charged, except in pursuance of his own agreement, and by his own consent. *Per* W. F. ALLEN, J., and BACON, J.

THE plaintiff Stebbins commenced this suit against Timothy Hough, William and James F. Hall and others, to foreclose a mortgage, executed by Timothy Hough to Robert M. Richardson, and claimed that William and James F. Hall were personally liable for any deficiency arising on the sale of the mortgaged premises, on the ground that they purchased the premises of Hough, and in the conveyance by warranty deed, from Hough to them, was this provision: "Subject also to a mortgage for \$3150, given by said Timothy Hough to Robert M. Richardson, dated August 26, 1854, which mortgage the said party of the second part hereto hereby assumes."

The answer of the Halls stated that they never assumed the mortgage; had never seen or accepted the conveyance with this provision; and that the same was inserted by fraud, accident or mistake; but they took the conveyance to secure a debt that Hough owed them, subject to this mortgage, and expressly refusing to become personally liable to pay it. The action was referred to John Porter, Esq., who found and reported, 1. That prior to the date of the deed mentioned in the pleadings, Timothy Hough was indebted to the defendants, William and James F. Hall, in a sum exceeding \$500, and that on that day, or shortly before, it was agreed between those parties that \$500 of that debt should be paid by the conveyance of the premises mentioned in that deed, from Hough and wife to the said defendants. 2. That the defendants agreed with Hough, to purchase the mortgaged premises at the price of \$3650, and after deducting said \$500, there would be left unpaid just the amount of said mortgage debt; that the defendants agreed to take their deed subject to said mortgage, and although Mr. Hall, the witness, doubtless supposed that he

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made a bargain which would not impose on them a personal liability for the payment of the mortgage debt, yet that with two witnesses testifying in opposition to his recollection, the referee was constrained to find that no special bargain was made that would exempt the purchasers, the defendants, from the legal effect of taking title subject to the mortgage. 3. That it was agreed by Mr. Hall, the witness, that as he was about to leave for New York, his residence, Mr. Richardson should draw the deed and submit it to Mr. Hillis of Syracuse, their counsel, to whom he had stated their agreement, for his examination and approbation; that said deed was never submitted to Mr. Hillis, nor seen by the defendants, or either of them, after it was executed, until after the commencement of this action, although it was taken to the office of Mr. Hillis, and from thence the same day to the clerk's office, and the recording charged to Hillis & Morgan. 4. That the defendants took possession of the mortgaged premises soon after the date of the deed, paid for making and repairing the fences, paid the interest that fell due upon the mortgage until 1847, and treated the lots as their own. 5. The referee also found and reported that there was due to the plaintiff, upon the bond and mortgage, the sum of \$1673.83; that the amount secured to be paid and remaining unpaid, including the interest, was \$3347.64, and that the mortgaged premises could be sold in parcels, without injury to the interests of the parties. He also found and reported as conclusions of law applicable to this case, "1st. That as the defendants agreed to purchase the mortgaged premises at the price of \$3650, subject to the mortgage, and made no special provision to repel the legal inference of their obligation to pay the mortgage as such purchasers, they are holden to pay the mortgage debt. And they are so holden, without regard to the phrase in the deed by which they are made to assume the payment. 2d. That the objection made by the counsel for the defendants, that the alleged obligation to pay the mortgage is inconsistent with the covenants, and therefore cannot be enforced, is without

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force, for the reason that such an objection could not be raised, except when the covenant is against the incumbrances, while the deed in question contains no other than the general covenant of warranty." He therefore found that the plaintiff was entitled to judgment against the defendants William Hall and James F. Hall, according to the prayer of the complaint, and ordered the same accordingly. Judgment being entered upon the report, in favor of the plaintiffs, the defendants, the Halls, appealed to the general term.

Le Roy Morgan, for the appellants.

C. B. Sedgwick, for the plaintiff.

BACON, J. If the learned referee, before whom this cause was tried, had placed his decision either upon the ground that the clause in the deed by which the defendants, William and James F. Hall, in terms assumed the mortgage existing upon the premises conveyed to them, charged them with its payment; or that upon the evidence in the case, as a matter of fact they became thus liable, I should hardly have ventured to dissent from his conclusion. But as I understand his rulings upon the trial, and especially the first conclusion of law contained in his report, he does not place his judgment upon either ground, but takes the broad position that this obligation results from the simple fact recited in the conveyance, that it was taken "subject to the mortgage." It is true that evidence was given upon both sides, to prove and to disprove the positions respectively assumed by the parties—on the one side, that the bargain was that the mortgage was to be assumed and paid, and formed a part of the purchase price of the land; and on the other, that the grantees expressly refused to assume, and become liable for, the payment of the mortgage, and that the clause was inserted in the deed without their knowledge or assent. In some of the rulings upon the trial, also, it would appear as if the referee intended to hold

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that, upon the evidence, the bargain was that the Halls should take the land subject to the mortgage, and assume its payment, and that from this agreement and assumption their liability in the case arose. But other decisions made by him are inconsistent with such a conclusion, and demonstrate that he intended to, and did, take a much broader ground. Thus when the defendants' counsel insisted that the words, "which mortgage the parties of the second part hereay assume," should be struck out, in accordance with what they claimed to be the evidence showing that they were improperly inserted, the referee met the objection by deciding that it was unnecessary to pass upon that question, since he had already held that "by taking the land subject to the mortgage, the defendants became liable for the debt." Still farther on, at folio 115, when the defendants' counsel claimed that the referee should decide, as a matter of fact, whether or not the defendants had accepted the deed, with the provision stating their assumption of the mortgage, the referee declined to pass upon that question, as unnecessary, inasmuch as he had arrived at the conclusion that the defendants were personally liable for the debt, upon the proposition already determined. And finally, in his report he states, as a conclusion of law, that as the defendants agreed to purchase the premises subject to the mortgage, and made no provision to repel the legal inference of their obligation to pay the mortgage, as such purchasers, they are holden to pay the debt. "And they are so holden," he adds, "*without regard to the phrase in the deed by which they are made to assume the payment.*"

The decision of the referee, then, manifestly is, that it was immaterial whether or not as a matter of fact the grantees agreed to assume a personal liability in respect to the mortgage; that the words in the deed by which they in terms assumed it, do not add to their liability, but that it exists by force of the words, "subject to the mortgage of \$3150 given by Timothy Hough to Robert M. Richardson;" and conse-

quently that the deed may be read as if it contained those words only, in the clause in question.

From this conclusion I dissent; nor do I think the proposition can be maintained upon principle or authority. To constitute a personal obligation upon a party taking a conveyance with an outstanding incumbrance, binding him to its absolute payment, I think something more is required than a mere statement in the deed that it is subject to the mortgage existing upon it. The natural inference from such language, it seems to me, would be, that the purchaser takes the property incumbered to the extent stated; that he purchases only the equity of redemption of the mortgagor, and that the covenant of warranty on the part of the grantor is qualified by such antecedent clause, so as to except the mortgage from its operation; and that the purchaser takes the chance of realizing enough out of the property, over and above the incumbrance, when it comes to be enforced, to secure to him the balance of the purchase money he has invested by way of advance; or, as in this case, as indemnity for an existing indebtedness on the part of the grantor. To create such a liability as is sought to be enforced here, either the language of the deed should be "subject to the payment" of the outstanding mortgage, or that "it forms a part of the purchase money which the grantee in the deed assumes to pay;" or some equivalent expression which clearly imports that an obligation is intended to be created by one party, and is knowingly assumed by the other. Whenever a party is thus sought to be charged with a duty primarily resting upon another, it must arise either from his express assumption, or from an obligation which the law implies, and casts upon him, from the words of his contract, or the language of his acts. This conclusion, I think, is borne out by the whole current of the authorities to which we were referred on the argument, and some to which no allusion was made. I am aware that in several reported cases, the marginal notes state in general terms and sometimes without any qualification, that where a mortgagor sells the

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mortgaged premises subject to the mortgage, the purchaser is bound in equity to pay off the mortgage. But in nearly every case, perhaps in all, where such a liability has been expressed, could we be furnished with the exact language employed in the conveyance, we should probably find that something more was added than the mere statement that the deed was subject to the mortgage. Thus in the case of *Halsey v. Reed*, (9 *Paige*, 446,) the language in the deed from which the liability of the grantee was held to arise, was, "which said mortgage is assumed by the party of the second part, and the amount thereof constitutes part of the consideration of this conveyance, and is deducted therefrom." In *Marsh v. Pike*, (10 *Paige*, 595,) in the opinion of the chancellor, it is stated that the premises were conveyed to the defendant, subject to the mortgage, "the amount of which was deducted from the purchase money," and which mortgage, it is added, the defendant McLean agreed with the plaintiff to pay off and discharge, either, as we are left to infer, by a clause in the deed to that effect, or by an independent covenant; and it was by force of this agreement that the defendant in that case was declared in respect to the mortgagor to be the principal debtor, and a primary personal liability devolved upon him.

In *Cornell v. Prescott*, (2 *Barb. S. C. R.* 16,) the marginal note is, that persons purchasing premises incumbered by a mortgage, and assuming the payment thereof as a part of the purchase money, become in equity the principal debtors, and the mortgagor is liable only as the surety of the purchaser. And in the statement of the case we find not only that in the conveyance the purchasers assumed the mortgage as a part of the purchase money, but executed a bond of indemnity to the grantor, to protect him against his liability on his bond.

The deed in the case of *Blyer v. Monholland*, (2 *Sand. Ch.* 478,) contained the clause that the same was subject to a mortgage given by the grantee to Blyer, "which the said party of the second part hereby assumes and agrees to pay." The only controversy in that case was whether this clause was

rightfully inserted in the deed; and the vice chancellor having found that it expressed the real agreement of the parties, gave effect to it, and enforced it as a personal covenant to pay any deficiency that might exist upon the sale of the mortgaged premises. And in *Cherry v. Monro*, (2 Barb. Ch. 618,) in addition to the recital in the deed that the same was taken subject to the mortgages existing on the premises, which were all enumerated, and the amounts due thereon accurately stated, a bond of indemnity with sureties was given to the grantor, conditioned to hold him harmless in respect to all the enumerated and described mortgages in the conveyance.

In *Flagg v. Thurber*, (14 Barb. 196,) the expression in the deed was, "This conveyance is made subject to one half of a mortgage executed by Thurber," &c., and then it is added, "which the said party of the second part assumes to pay, and which is part of the consideration money mentioned above." The judgment in this case was indeed modified and in part reversed by the court of appeals, in 5 *Selden*, 483; but the principle upon which a personal liability was sought to be charged by virtue of the clause in the deed, was not in any respect doubted. Full effect would have been given to it if it had stood alone; but it was neutralized, or rather superseded, by a contract subsequently entered into between the same parties, changing its legal operation.

It is true that the chancellor, in the case of *Jumel v. Jumel*, (7 Paige, 594,) and Judge Bronson in *Ferris v. Crawford*, (2 Denio, 595,) use language which imports that in their opinion a clause in a deed declaring it to be taken subject to a mortgage thereon, creates an obligation on the part of the grantee to pay and discharge the mortgage, and thus relieve the personal liability of the mortgagor, upon his bond. But in the latter case it is to be remarked that the precise language of the deed is nowhere stated in the case, but it is alleged that the amount of the mortgage debt was deducted from the price which was agreed to be paid for the land; and from this, as well as other considerations, the judge said that

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the equity of the case required that the grantee should pay the mortgage. And in the case of *Jumel v. Jumel*, without stopping to comment particularly upon what was really decided, it should be noticed that the mortgage was twice referred to in the deed, and in such terms as induced the chancellor to say that the language was explicit enough to show the intention of the parties that the grantee was to take the premises subject to the payment of the mortgage. In truth the precise question we are now dealing with, did not necessarily arise in either of those cases.

On the other hand, two cases decided in the superior court of New York hold the exact converse of the proposition which the referee in this case maintains in his report, and on which he founds his judgment. *Tillotson v. Boyd*, (4 Sand. 516,) was a case where a personal liability was sought to be enforced against a grantee in a deed, which contained only the words that the conveyance was subject to a mortgage upon the premises, and the relief sought was denied; the court saying that the omission to insert in the deed a covenant that the grantee would assume the payment of the mortgage, was strong evidence that the parties did not intend that he should be liable. In the case of *Murray v. Smith*, (1 Duer, 412,) the same question again arose; the deed containing a clause that the conveyance "was subject to the one half part of the mortgage" existing on the premises. The judge, on the trial, ruled that this clause in the deed imposed no obligation, express or implied, on the grantee to pay one half of the mortgage; and the court in full bench approved the ruling, and held that the deed did not of itself impose any obligation upon the grantee to pay any part of the outstanding mortgage. Indeed, under the provision of the revised statutes that no covenant shall be implied in any conveyance of real estate, I do not see how any other conclusion can be reached. It is true that in the case of *Murray v. Smith*, a recovery was had; but it proceeded upon an express promise outside and independent of the deed, and upon which the deed was executed and accepted. See

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also *Trotter v. Hughes*, (2 Kern. 74,) where the court decide that where a party accepts from a person liable to pay a debt secured by mortgage, a conveyance of the mortgaged premises, *by the terms of which he agrees to pay the debt*, he is liable to the holder of the mortgage for any deficiency remaining after sale of the premises; and which, by necessary implication, if not in express terms, holds that no such obligation arises where the conveyance is merely declared to be subject to the mortgage, and without any assumption of its payment. Within the authority of these cases, and the principle to be extracted from the others above referred to, and upon which alone they can stand, I think the referee erred in adjudging the defendants in this case liable upon the single ground assumed in his report, that such liability arose from the simple recital in the deed that it was subject to the mortgage existing upon the premises when they received their conveyance. The result is, that the judgment must be reversed and a new trial granted, with costs to abide the event.

W. F. ALLEN, J. The learned referee has based his report and judgment in this action on the fact, that the defendant Hall agreed to take a deed of the mortgaged premises subject to the mortgage; adjudging, as a legal consequence of that act, a personal liability on the part of the grantees to pay the mortgage debt and indemnify their grantor, who was also the mortgagor. The referee, in effect, holds and decides that a person taking a conveyance of property, subject by the terms of the conveyance to a prior incumbrance, is thereby charged personally with the payment of the incumbrance, unless he secures an exemption from liability by a special agreement with his grantor; that the liability is a legal result of the act of accepting the conveyance, and does not rest upon the contract of the parties. In the report, and as a part of the finding upon the facts, the referee says that the defendants agreed to take their deed subject to the mortgage; and although they doubtless supposed they had made a bargain which would

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not impose on them a personal liability for the payment of the mortgage debt, yet that no special bargain was made that would exempt them from the legal effect of taking title subject to the mortgage. It is not found that the defendants assumed the payment of the mortgage debt. On the contrary, it is clearly to be implied from the case and facts, as settled by the referee, that there was no agreement on the part of the defendant Hall to pay the mortgage. It is not found that the mortgage debt constituted a part of the purchase money of the premises, and as such was to be paid by the grantees. It is true the referee says that the price was \$3650, and deducting the \$500 allowed upon the debt of the grantor to the grantees, left precisely the amount of the mortgage debt. Had the referee gone further, and found that the grantees assumed the payment of this as a part of the consideration of the purchase, the case would have been entirely different. The referee has declined to pass upon the question of acceptance of the deed by the grantees as executed by the grantor and mortgagor, and which if accepted by them would make them clearly liable to pay the debt. By the terms of the deed, the grantees are made to assume, in express terms, the payment of the mortgage; but the referee rests his decision solely on the ground first named, to wit, that the taking of a conveyance subject to an incumbrance creates a personal liability, the same in legal effect as would result from a clause in the conveyance expressly assuming and undertaking the payment. This is, I think, farther than the cases have gone. No party can be charged with the payment of the debts of another, except by his consent or agreement; and in all the cases in which a party succeeding to the rights of another in property has been personally charged with the duties resting upon his predecessor, an agreement, express or implied, has been relied upon. In some instances the assumption of the obligation has been by an express agreement, and in others it has been implied from the terms of the deed or the circumstances of the transaction and the acts of the parties; but in no case has a party been charged,

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except in pursuance of his own agreement and by his own consent. Had the referee here found from the evidence that the defendant Hall in fact assumed the payment of the mortgage, the judgment of law would have been right. In *Burnett v. Lynch*, (5 Br. & C. 589,) the assignment of the lease was subject to the payment of the rent and the performance of the covenants contained in the lease, and the lessee was allowed to maintain an action against his assignor for neglecting to perform the covenants during his occupation. The court held that the defendant, by taking the estate subject to the *payment* of the rent and the performance of the covenants, had made it his duty to pay the rent &c., and that the law would imply a promise as arising out of that duty. The estate was subject to the payment of the rent and performance of the covenants, and it was not to be supposed that the assignor intended to perform the acts upon which the estate of the assignee depended. *Steward v. Walridge*, (9 Bing. 60,) was also the case of an assignment of a lease subject to the payment of the rents &c., and the courts held that these words imported an agreement. Tindall, C. J. said he was unable to put any other construction on the words than that they imported an assent on the part of the defendant that he would perform all the covenants in the original indenture of lease.

A conveyance subject to the payment of a mortgage has been held, repeatedly, to amount to an agreement on the part of the grantee to assume and pay off the mortgage; and it is said, in one or two cases, that a conveyance "subject to a mortgage" is equivalent to a conveyance "subject to the payment of such mortgage;" unless there be something to indicate a different intention. But, within this doctrine, the referee in this case, upon the facts found by him, should have given a different judgment, for he has found indications of a different intention. *Minor v. Terry*, (6 How. Pr. Rep. 208.) is one of the cases in which this idea is advanced; but the question was not in the case, and was not decided by the learned judge. He refers for the principle to several cases in our own court

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of chancery ; and, upon examination, it will be seen that in no one of them was the question involved or decided by the chancellor. *Jumel v. Jumel*, (7 *Paige*, 591,) decides that mortgaged premises conveyed by the mortgagor, subject to the mortgage, become the primary fund for the payment of the mortgage ; and that the party succeeding to the title, who was also the administratrix of the mortgagee, could not charge to the estate payments made by her in discharge of the mortgage. It is true the chancellor intimates that the clause would be sufficient to charge the grantee personally, but it was not necessary to decide that question. In *Halsey v. Reed*, (9 *Paige*, 446,) the grantee expressly agreed to pay the mortgage, and the amount was by the deed declared to constitute a part of the consideration of the conveyance, and to have been deducted therefrom. A similar agreement and statement was contained in the deed of conveyance in *Russell v. Pistor*, (3 *Seld.* 171 ;) and in that case the question was, whether that part of the mortgaged premises conveyed was the primary fund for the payment of the mortgage. In *Cherry v. Monro*, (2 *Barb. Ch. Rep.* 618,) there was an express assumption of the mortgage debt by the grantee, and there was no question as to what the agreement was, or as to the rights of the parties to it, as between themselves. The questions settled in the suit concerned the equities of third persons, growing out of those transactions. These cases, with the exception of *Russell v. Pistor*, are relied upon by Judge Gridley for his doctrine in *Minor v. Terry*. In *Marsh v. Pike*, (10 *Paige*, 595,) there was an express agreement to pay the mortgage. The same is true of *Blyer v. Monholland*, (2 *Sandf. Ch. Rep.* 478.) In *Ferris v. Crawford*, (2 *Denio*, 595,) the contest was whether the land was the primary fund for the payment of the mortgage debt. There the mortgaged premises were conveyed subject to the mortgage, and the mortgage debt was deducted from the price which the grantee agreed to pay for the land, and it was properly held that the purchaser was bound, in equity, to pay off the mortgage. In *Flagg v. Munger*, (14 *Barb.* 196 ; *S. C.*

5 *Seld.* 483,) the grantee, in terms, assumed the payment of the mortgage debt as a part of the purchase money, and no question like that in this case arose. In *Trotter v. Hughes*, (2 *Kern.* 74,) the owner of the equity of redemption was not personally liable for the payment of the mortgage, and conveyed subject to the mortgage, and the deed of conveyance contained the statement that the mortgage formed the consideration money in the deed, and it was held that the grantee was not liable to pay the mortgage. The principle which Judge Denio extracts from the cases in our own courts is, that “the acceptance of a conveyance containing a statement that the grantee is to pay off an incumbrance, binds him as effectually as though the deed had been *inter partes*, and had been executed by both grantor and grantee.” But the case decides that the principle is not applicable where the grantor was not himself liable to pay the incumbrance, and that when a party thus situated conveys the mortgaged premises, subject to the mortgage, and the grantee engages to pay it off, such agreement must be construed as a mere declaration that the property was conveyed subject to the lien of the mortgage thereon, and that the general covenants of seisin and warranty, in the conveyance, are not intended to extend to this particular incumbrance of which the grantee assumed the payment, in case he should wish to retain the title of lands conveyed to him. It was supposed that this construction of the deed was in accordance with the intentions of the parties and a sound exposition of the law. A grant, then, of premises subject to the lien of a particular mortgage, does not imply a personal engagement to pay it, on the part of the grantee, for the reason that it is no evidence of an intent on his part to assume its payment. The clause has full scope for its operation and effect without operating to charge a party, not only without any evidence from which a promise can be implied, but, as in this case, against his clearly expressed intention, as found by the referee. All personal liability resting in contract must have a foundation in the consent of the party to be charged.

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There is no rule of law which authorizes courts to charge a party, as upon a contract, contrary to his intent, as evidenced by the contract itself. A conveyance, subject to liens, merely excepts such liens from the operation of the covenants of warranty, and makes the land the primary fund for their payment, as between the grantor and grantee, and the latter cannot retain the land and compel or leave his grantor to pay the incumbrance. The liability must grow out of the contract of the party.

The supreme court of the city of New York decided, in *Murray v. Smith*, (1 *Duer*, 412,) that a conveyance of an undivided moiety of mortgaged premises "subject to the one half part of the mortgage," did not create a personal obligation on the part of the grantee to pay one half of the mortgage debt. *A fortiori*, then, the agreement to accept such conveyance would not create a personal liability. The same court, however, held that an actual promise of the grantee to pay the incumbrance might be shown. The deed may be some evidence of the promise, and whether sufficient to charge the party must depend on the circumstances. I should think it not sufficient when the conveyance of the equity of redemption was taken for a hopeless debt, subject to an incumbrance for five times the amount of liability nominally paid by it. The evidence of an intent to assume the payment of the incumbrance would, I think, be wanting in such case, without some evidence other than that of a conveyance subject to the incumbrance, or an agreement to take such conveyance. There is evidence in the cause which the referee did not pass upon, and which may vary the result from that indicated.

The judgment must be reversed, and a new trial granted; costs to abide the event.

PRATT, P. J. concurred.

Judgment accordingly.

[ONONDAGA GENERAL TERM, July 5, 1859. *Pratt*, W. F. *Allen* and *Bacon*, Justices.]

THOMAS JESSUP *vs.* CHARLES E. HULSE and THOMAS E.
HULSE and wife.

When an assignment for the benefit of creditors contains provisions which necessarily tend to hinder, delay or defraud creditors, these provisions are conclusive evidence of the design of the parties to the instrument, and the law therefore declares it void, as being within the prohibition of the statute.

It is not necessary, in pleading, to point out the particular features or clauses of the instrument, which are objected to.

It is the intent to defraud upon which the statute fastens, and the law treats these directions or provisions as conclusive proof of such an intent.

A provision in an assignment for the benefit of creditors, directing the assignee "to sell, dispose of, and convey the said real estate and personal property at such time or times, and in such manner as shall be most conducive to the interests of the creditors" of the assignor, "and convert the same into money as soon as may be consistent with the interests of said creditors," renders the assignment void, inasmuch as it confers the power to *delay* making sales of the assigned property, and converting the same into money.

An assignment which authorizes a delay in bringing the assigned property to sale, is open to the same objection as a clause authorizing a sale upon credit, involves the same consequences, and must meet with the same condemnation. *Per* EMOTT, J.

The spirit of the later decisions is, that a debtor can go no farther than to direct the appropriation of his property to the payment of his debts, and to select the person who is to convert and apply it. *Per* EMOTT, J.

MOTION for a new trial upon a case, which was ordered to be heard in the first instance at the general term. The nature of the action, and the facts appearing on the trial at the circuit, together with the legal questions arising from such facts, sufficiently appear in the opinion of the court.

E. A. Brewster, for the plaintiff.

Gott & Van Duzer, for the defendants.

By the Court, EMOTT, J. The object of this action is to set aside a conveyance of real estate to the defendant Pamela Hulse, the wife of Thomas E. Hulse, and a sale of personal property to Thomas E. Hulse, and also a judgment confessed by Charles E. Hulse to Thomas E. Hulse. The sale and con-

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veyance were made by Mr. Joseph W. Gott, acting as assignee of Charles E. Hulse, in trust for the benefit of creditors, and they are attacked on the ground of the invalidity of the assignment. It is objected that Mr. Gott is a necessary party to the action, so that no judgment can be given in his absence. But none of the property is now in possession of Mr. Gott; he has parted with all his title to it, and if he has received any proceeds, no recourse to them is asked for. No judgment or relief is asked against Mr. Gott, and the object of the action will be attained by setting aside the title of his grantees. The present controversy can be completely disposed of without affecting him, and therefore without requiring him to be a party to the suit.

The defendants' title to both the real and personal property which they purchased of the assignee of Charles E. Hulse, is subject to all the defects, and liable to all the objections, which could affect his title. They are not *bona fide* purchasers; so the jury have found, and very correctly, because the only consideration for these purchases which moved from either Thos. E. Hulse or his wife, was a receipt given to the assignee upon a debt due from Charles E. Hulse to Thomas E. Hulse, and which was preferred in the assignment. The property was therefore simply transferred, and conveyed in payment of a precedent debt. No money was advanced, and no existing security relinquished. If the payment failed, the parties were left in their original condition, and the debt continued unsatisfied. Thus there was no valuable consideration paid by these purchasers, and therefore they were not what the law regards as purchasers in good faith, and can claim no greater right than such as belonged to their grantor. The validity of his title of course depended upon the validity of the assignment made to him by Charles E. Hulse, in trust for the payment of his debts.

It was contended that the allegations in the complaint are not sufficient to put in issue the validity of this instrument; unless it could be impeached for fraud in fact, or because it

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was not accompanied by a change of the possession of the assigned property. The complaint contains a distinct charge that the assignment was made to hinder, delay and defraud the creditors of the assignor, and that it is therefore fraudulent and void. This is unexceptionable and sufficient pleading, where the vice of the instrument is inherent in its terms. When an assignment contains provisions which necessarily tend to hinder, delay or defraud creditors, these provisions are conclusive evidence of the design of the parties to the instrument, and the law therefore declares it void, as within the prohibition of the statute. It is not necessary in pleading to point out the particular features or clauses of the instrument which are objected to. It is the intent to defraud upon which the statute fastens, and the law treats these directions or provisions as conclusive proof of such an intent.

A part of the relief asked by this complaint is, that a judgment confessed by Charles to Thomas Hulse should be set aside. This might have been done upon motion, but it was properly sought in the present suit. The statement in the confession is insufficient and bad within all the decisions; and it was immaterial, so far as regards the rights of the present plaintiff, or the object of his suit, whether the indebtedness, for which this judgment was confessed, was honest and justly due or not. So far as a subsequent judgment creditor is concerned, if the judgment does not conform to the statute, it must give way and lose its priority. If it could be amended, it would be only as to the rights of the parties to the judgment, and without prejudice to those of other judgment creditors.

The case turns entirely upon the validity of the following provision in the assignment. The assignee is directed "to sell, dispose of and convey the said real estate and personal property at such time or times and in such manner as shall be most conducive to the interests of the creditors of the said party of the first part, and convert the same into money as soon as may be consistent with the interests of said creditors."

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It is contended that this provision confers upon the assignee a discretionary authority to delay the sale of the property, and to sell upon credit, if he thinks proper. In the two leading cases of *Nicholson v. Leavitt* and *Burdick v. Post*, (2 *Seld.* 510, 522,) the assignments contained an express authority to the assignee to sell the property either for cash or upon credit, according to his discretion; and these decisions have established the doctrine that an assignment for the payment of debts is void, if it authorizes a sale of the property on credit. In *Brigham v. Tillinghast*, (3 *Kern.* 215,) the assignment in question directed the assignees to convert the property, as soon as practicable and expedient for the best interests of all concerned, into cash or *available means*. This direction was held to be fatal to the instrument, for the reason that "*available means*" must be understood to mean credits, and therefore the assignees were authorized to sell on a credit. The clause directing the assignees to convert the property, as soon as practicable and expedient for the interests of the creditors, was not considered, and the decision was placed altogether upon the effect of authorizing the sale for available means. This case does not therefore decide whether a direction to convert the property into money, as soon as expedient, would of itself imply an authority to sell upon credit; nor whether it would authorize the assignee to delay exposing the property to sale until he should consider it expedient to do so; nor finally, whether expressly bestowing this discretion upon the assignee would avoid the assignment. The assignment now before us does not authorize, in terms, a conversion of the property into any thing but cash. In that respect it differs from the deed in question in *Brigham v. Tillinghast*, and also from an assignment which was condemned by Judge Welles, in a case decided by him at special term, and reported in 8 *How. Pr. R.* 468, (*Murphy v. Bell.*) The authority conferred on the assignees in that case was, "within such convenient time as to them should seem meet and most conducive to the interests of those concerned," to convert the assigned

property, "*and all the securities taken for the same,*" into money. The learned judge expresses the opinion that the language used as to the time within which the property should be sold, of itself conferred an authority to sell on credit. But the clause directing a conversion, not only of the property, but of all securities taken for the same, as Judge Welles justly remarks, makes the inference very strong that the assignor contemplated sales on credit. This clause distinguishes that case, somewhat, from the present.

The case of *Woodburn v. Mosher*, (9 Barb. 255,) is also reported at special term. The language there was that the assignees were, within such convenient time as to them should seem meet, to convert the property into money. This was held to be fraudulent, not as authorizing sales for credit, but as conferring upon the assignee discretionary power to delay the sale, and thus postpone the conversion of the debtor's property, and the payment of his debts. In *D'Ivernois v. Leavitt*, (23 Barb. 63,) the reason for setting aside the assignments, which did not fall within the scope of the decision in *Nicholson v. Leavitt*, (2 Seld. 510,) was that these instruments authorized the trustees to make distribution of the proceeds of their sales within such convenient time as to them should seem meet. Here the discretion to delay was in the distribution, not in making sales or realizing the proceeds; but, in either case, there was a delay created, a hindrance interposed, which the courts would not tolerate. I think the principle which these cases contain is fatal to the present assignment, whatever construction may be given to the clause we are considering.

It may be well, however, before examining this question more particularly, to advert to the case of *Kellogg v. Slauson*, (1 Kern. 302,) which was cited to sustain this assignment. In that case the question arose upon an assignment which authorized the assignees to dispose of the property upon such terms and conditions as in their judgment might be best for the parties, and to convert the same into money. The court,

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acting upon the principle that such a construction ought to be given to every deed as will sustain it, if possible, held that the discretion here conferred, as to the terms and conditions of the sale, would be satisfied by referring it to regulating the manner in which sales were to be made, whether public or private, or in bulk or small quantities. The time, either of sales or payments for property sold, was not mentioned, and it was held that the discretion conferred did not necessarily, or by its terms, extend to this. There is nothing in that case inconsistent with the subsequent decisions to which I have referred, or with the doctrine distinctly announced in *Brigham v. Tillinghast*, (3 Kern. 215,) and still more expressly in *Dunham v. Waterman*, (17 N. Y. R. 9,) that the whole extent of the power of an insolvent debtor over his property, when he makes a general assignment, is to select his assignee, and to direct the order of the application of his property, and of the payment of his debts. He may substitute his assignee for the officer of the law, and he may indicate an order of preference among his creditors, instead of the priority or the equality which the law establishes; but if he attempts more than this, he interposes delay and hindrance, if he does not defraud his creditors.

I do not think it necessary to determine whether the assignment now before us imports or confers an authority to sell on credit. If it do not, it must confer the power to delay making sales of the assigned property, until such time as the assignee may think most conducive to the interests of creditors. That is the very language of the deed; and besides this, the property is to be converted into money, not forthwith, but "as soon as may be consistent with the interests of the creditors." The objection to assignments authorizing sales on credit is, that they postpone the payment of the assignor's debts. The credit given to the purchasers of his property, either with the object of realizing larger prices, or for any other purpose, necessarily extends the time of payment of his debts, and this is beyond the power of the debtor. He cannot, by transfer-

ring his property to a friendly assignee, avoid the obligation of immediate payment. The same reason exists for the objection to an assignment which, as in *D'Ivernois v. Leavitt*, authorizes a distribution at the pleasure or discretion of the assignees. Thus the courts condemn assignments which permit the assignees to delay the time of payment for property sold, in order to its conversion into money, and also assignments which authorize the assignees to postpone for any length of time the distribution of the proceeds of sale. Both these classes of deeds are condemned, because their effect is to sanction a delay of the ultimate payment of the creditors. An assignment which authorizes a delay in bringing the assigned property to sale, is open to the same objection, involves the same consequences, and must meet with the same condemnation. Indeed, it is here that the temptation to delay for the advantage of the debtor is often the strongest. If an insolvent debtor can secure his property from the grasp of the law, and place it in friendly hands, authorized to hold it until times may change, and the property can be sold to better advantage, he will often secure a great benefit to himself. But it will be at the expense of his creditors, or at least in violation of their rights. They have a right to insist upon the appropriation of his property to the payment of his debts, without any farther delay than such as is necessary and inevitable. He has no more right to delay the sale of his property than he has to postpone the collection of its proceeds or their distribution among his creditors.

It is said that a direction to an assignee to sell at such times as may be conducive to the interests of the creditors, is simply giving him a discretion which the law itself confers upon him. The answer to this proposition is given by Judge Selden, in *Dunham v. Waterman*, (17 N. Y. Rep. 19.) Here is a discretion conferred to delay the sale of the assigned property. Admitting that if the assignment had been silent on this point, the law would have permitted the exercise of some discretion in the time of the sale, that would be the law's dis-

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cretion. It would be determined by the courts, and the trustee could be hastened if the courts saw fit. But if the debtor can confer on his trustee the power to determine when his property shall be sold, what right could the courts have to hasten his movements, unless he was evidently acting in bad faith? If he could say that he expected, by postponing a sale, to obtain larger prices for the property, he would be acting within both the letter and spirit of his discretionary power; and as long as he was honest in such a course, and perhaps showed good ground for his belief, what right would the courts have to interfere? But a man's creditors have a right to the application of his property to their demands forthwith, and not when it will sell for the largest prices, or pay the most of his debts. They have a right to ask, what the court, if such an assignment were sustained, would have no power to compel, an immediate appropriation of their debtor's property. The answer to their petition for this would be, that the debtor had conferred on his assignee the power to determine when he would sell his property, and this trustee was holding it, honestly awaiting a rise in prices which would enable him to realize more, and therefore the court could not interfere. We shall be compelled to give such answers as this to creditors who are hindered and delayed by assignments—and they are all, to some extent, hindrances—or we must adhere to the spirit of the later decisions, and hold that a debtor can go no farther than to direct the appropriation of his property, and select the person who is to convert and apply it.

We are of opinion that the rulings of the judge at the circuit were correct, and that judgment must be entered for the plaintiff with costs. This judgment must provide for the appointment of a receiver, and the delivery to him of the personal property conveyed to the defendants, or the payment of its value. It will also declare the invalidity of the defendants' title to the real estate, and remove the obstruction to the enforcement of the plaintiff's lien in its proper order.

GURNEE *vs.* HOXIE & LEWIS.

One of two defendants, appearing by a separate attorney and having a separate and different defense, may bring the cause, as to himself, to trial, and in case no one attends for the plaintiff, may take a judgment of dismissal, by default.

MOTION for a rehearing of a motion made at a special term to set aside a judgment of dismissal, on the ground of irregularity.

By the Court, ROOSEVELT, P. J. One of the two defendants, the only real defendant in the cause, appearing by a separate attorney and having a separate and different defense, brought the cause as to himself to trial, and no one attending for the plaintiff, took judgment of dismissal by default. It is insisted that the default so taken was irregular and ought to be set aside. The judge at special term having denied a motion to that effect, and another judge having then been applied to for a rehearing of the question, the whole matter was referred by him to the general term.

The plaintiff relies on the 258th section of the code, which provides that "either party" may bring "the issue" to trial, and in the absence of the other party may take a dismissal of the complaint, or a verdict or judgment, as the case may require. Either party, it is said, means all the plaintiffs on one side and all the defendants on the other. A single one of two or more defendants, it is contended, is not a *party* within the meaning of the code.

This position is not well taken. Either party clearly means either party to the particular issue to be tried. The instance of a maker and indorser of a promissory note, both sued in the same action, is an illustration. The only defense of the indorser may be want of notice of protest; an issue in which the maker has no interest. Why should the indorser, in such a case, be compelled to wait the movements of his co-defendant?

A subsequent clause of the section quoted shows that this was the view of the legislature. It declares that "a sepa-

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rate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever, in its opinion, justice will thereby be promoted." In the present instance the court did "*allow*" such separate trial. No formal order, it is true, was made in advance—and none was necessary. Until the cause was called in its order on the calendar, the defendant Hoxie could not know that the defendant Lewis would be absent. Hoxie had duly notified the plaintiff, and that was all the law required of him. "Either party (says the code) may give notice of trial, and either party *giving the notice* may bring the issue to trial."

It may in some instances be inconvenient to have more than one trial. That must depend upon the circumstances of the case as disclosed when the moving party is heard. The court which may be called upon to try the issue will determine, after such hearing, whether justice will be promoted by "*allowing*" a separate trial. If "*its opinion*" should be adverse, the cause would of course be ordered to stand over. In this case the judge, as it seems to me, very properly "*allowed*" it to go on. His decision, it being a mere matter of discretion, is final.

I have less reluctance in arriving at this conclusion, when I consider the small amount of the demand, its staleness, and its very dubious character.

There is also another objection to the plaintiff's application. His order to show cause does not specify the irregularity complained of. He is therefore, by the 39th rule, irregular himself.

Motion denied, with costs.

[NEW YORK GENERAL TERM, February 6, 1859. *Roosevelt, Davies and Clerke*, Justices.]

BROWN *vs.* BIRDSALL and others.

Where joint debtors reside in different states, they may be sued separately in the states having jurisdiction of their respective persons or property ; and a judgment in such case, against one, in one state, is no bar to a recovery against the others, in another state.

Persons giving credit to a firm, supposed to consist of five persons, without any knowledge of two other partners, in the absence of any allegation or proof that the connection of those two with the firm was notorious, or was in any way disclosed, have the right, but are not bound, to sue all the partners.

A PPEAL from a judgment entered upon the report of a referee.

By the Court, ROOSEVELT, P. J. This action, and all the issues in it, were referred to Mr. Scudder to hear and determine, on motion of the defendants Birdsall and Mather, who now complain of the referee's report, having taken, it is stated, "more than one hundred exceptions to his decisions" in the course of the trial. These exceptions the plaintiff's counsel has classified under various heads ; some as "unfounded ;" some as "nullities ;" some as "frivolous," and some as "simply nonsensical." As they are all, or nearly all, more or less connected with the pervading one arising out of an alleged "*defect of parties*," I shall confine myself mainly to the examination of that question.

The defendants are five in number. The complaint alleges that they were "partners in trade doing business under the firm name and style of A. Birdsall & Co. ;" and that the goods for the price of which the suit is brought, were sold and delivered "to the said firm of A. Birdsall & Co. ;" in other words, to the five named defendants. Mather, in his answer, denies, first, any knowledge of the plaintiff's claim, and alleges, in addition, that the firm, besides the five persons made defendants, consisted of Burr Higgins, a resident of North Carolina, and George S. Runey, a resident of Massachusetts ; and that the complaint, by reason of the omission of their names, is defec-

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tive, and for that defect should be dismissed with costs; thus tendering an issue on the merits and in abatement, in one and the same pleading—a position which, however inconsistent with itself and with the old practice, is tolerated, it is said, by the code. Assuming that to be so, and that the objection to answering is not overruled by answering, it is sufficiently met, as I conceive, by the two following considerations: *First.* The referee finds, as matter of fact—and there is no sufficient ground in that respect for setting aside his verdict—that the goods were sold and delivered “to the *defendants.*” The contract, therefore, was made with them; and there is a necessary implication that the plaintiff, at the time of the sale, knew nothing of the other two dormant partners. Indeed the answer does not deny that the contract, if any, was made, as alleged by the plaintiff, with the five defendants; nor does it aver that the plaintiff had any knowledge of the other two partners, or that their connection with the firm was notorious, or that it was in any way disclosed. In such cases, persons giving credit to a firm have the right, but are not bound, to sue all the partners. (*De Mautort v. Saunders*, 1 B. & Adol 398.) *Second.* The two dormant partners being residents of other states, no effectual remedy in this state could be had against them. It is not pretended that there was any joint property of the seven within the jurisdiction of the court. A special judgment, therefore, under the statute, would, as to the two absentees, have been little more than *vox et pretereā nihil*. The law allows, but does not compel, the statute procedure. Indeed it might be questioned whether the legislature had power even to *authorize* a suit, in this state, against a citizen of another state, without having either his person or his property within the jurisdiction. We ourselves, in the celebrated divorce case of *Borden and Fitch*, have treated a judgment rendered in Vermont in such a suit as a mere nullity; and we could hardly claim for our own courts a power which, under like circumstances, we had denied to those of a sister state.

The ancient practice in these cases was to outlaw the non-

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appearing parties, and then take judgment against the others alone. In 1830, however, (2 *R. S.* 553,) the legislature abolished "all process and proceedings to outlaw any defendant in a civil action." The necessary result of this change would seem to be a permission in suits against joint debtors to omit such as could not be served. Nor does the joint debtor act, if its true interpretation be as above stated, alter the case. In that view it is an enabling and not a compulsory act ; enabling where there is property to be affected by the judgment, and not compulsory where there is none. The court is not to intend that the legislature contemplated either an impossibility or a nullity ; that parties should be sued who could not be summoned ; or that judgments should be obtained which could not be executed.

It may be laid down, I think, as a sound proposition, that where joint debtors reside in different states, they may be sued separately in the respective states having jurisdiction of their respective persons or property, and that a judgment in such case, against one in one state, is no bar to a recovery against the others in another state.

As to the cost of the hundred exceptions, they were either unimportant, or if well taken when first stated, were superseded by subsequent testimony, mostly on the part of the defendants themselves.

Judgment for the plaintiff on the report of the referee affirmed, with costs.

[NEW YORK GENERAL TERM, February 6, 1859. *Roosevelt, Clerke and Davies*, Justices.]

RIPLEY vs. THE ÆTNA INSURANCE COMPANY.

A stipulation in a policy of insurance, requiring the insured to sue, if at all, in twelve months, operates as a forfeiture, and is therefore to be construed strictly. Slight evidence of waiver, as in other cases of forfeiture, will be sufficient to defeat its application.

The court, to aid a forfeiture, will not scrutinize very closely the verdict of a jury on such a point; nor the rulings of the judge at the trial, unless very clearly erroneous.

A policy of insurance was based on a written survey, in the form of question and answer. To the question whether there was a watchman in the mill during the night, the assured answered, "There is a watchman nights;" and to the question whether the mill was left alone at any time after the watchman went off duty in the morning, they answered, "Only at meal times, and on the sabbath, and other days when the mill does not run." The fire occurred between three and four o'clock in the morning, on Sunday, when no watchman was present. And it appeared that by the custom of the mill no watch was kept, from twelve o'clock Saturday night to twelve o'clock Sunday night. *Held* that by express terms, as well as by custom, Sunday was excepted from the stipulation; and that the insurers were not released from their liability, by the omission of the assured to keep a watchman in the mill on that day.

THE plaintiff brought this action as the assignee of the Glendale Woolen Company, on a policy of \$12,500, dated 11th September, 1848, upon a factory, machinery, stock, &c., situate at Glendale, in Stockbridge, Mass. The policy was based upon a survey which was referred to and made a part of the policy. In the survey questions were put to the assured, and answered as follows: "8. Is there a watchman in the mill during the night? Is there also a good watch clock? There is a watchman nights; no clock; bell is struck every hour from eight P. M. till it rings for work in the morning." "Is the mill left alone at any time after the watchman goes off duty in the morning, till he returns to his charge in the evening? Only at meal times, and on the Sabbath, and other days when the mill does not run." "15. During what hours is the factory worked? Summer, commence at five o'clock A. M., work till dark; winter, commence as soon as we can see in the morning, work till eight o'clock P. M., except occasionally running over time nights, to even up the

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work." The property insured was destroyed by fire between three and four o'clock in the morning of Sunday, the 8th April, 1849. No watchman was in the mill, and no watch was kept, by the custom of the mill, from twelve o'clock Saturday night to twelve o'clock Sunday night. At the time of the fire there were two other policies upon the property for \$12,500 each—one issued by the Protection Company, and the other by the Hartford Insurance Company. The three policies were founded upon the same survey. One of the conditions of the policy issued by the Ætna company is in these words: "13. It is furthermore hereby expressly provided, that no suit or action of any kind against said company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any suit or action shall be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." Immediately after the fire, the preliminary proofs of loss, &c., were prepared and delivered to the company. At the expiration of sixty days, payment of the loss was demanded and refused. Some further attempts were made to induce the defendants to pay the loss. On the 7th August, 1849, the defendants in writing again formally rejected the claim. On the 25th and 26th days of September, 1849, suits were commenced by the insured against the defendants upon the policy, in the superior court at Hartford, Connecticut. These suits remained pending until January, 1852, when they were withdrawn. On the 6th December, 1852, the Glendale Woolen Company assigned their claim to the plaintiff, who, on the 23d December, 1852, commenced this suit, demanding judgment for the \$12,500 with interest.

The grounds of defense to the action were two : *First*. That

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the questions and answers in the survey, as to a watch, were a part of the policy, and constituted a warranty on the part of the assured that there should be a watchman in the mill *every night* in the week, and all night; and that by the failure of the assured to keep a watch after twelve Saturday night and before twelve Sunday night, the defendants were discharged. *Second.* That this action was barred by lapse of time, under condition No. 13 of the policy, having been commenced nearly four years after the loss. On the trial in January, 1858, at the circuit, the presiding justice decided and ruled: *First.* That the survey was a warranty, and if violated, the defendants were discharged. *Second.* That by the true construction of the eighth question and answer in the survey, the insured were excused from keeping a watch from twelve o'clock Saturday night to twelve o'clock Sunday night, and that there was no breach of the warranty. *Third.* That the 13th condition of the policy (the limitation) was valid, but might be waived. The question of waiver of limitation was the only one submitted to the jury. The jury rendered a verdict for the plaintiff for the whole amount claimed. The counsel for defendants then moved, upon the minutes of the judge, to set aside the verdict, which motion was denied. Judgment having been entered upon the verdict, the defendants appealed from the judgment, and from the order denying their motion to set aside the verdict.

M. Porter and *W. M. Evarts*, for the appellants. I. The eighth question in the survey, with the answers, constitute a warranty on the part of the insured. (*Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. Rep. 19. *Houghton v. Manufacturers' Ins. Co.*, 8 Metc. 114. *Farmers' Ins. Co. v. Snyder*, 16 Wend. 481. *Alston v. Mechanics' Ins. Co.*, 4 Hill, 330. *Wood v. Hartford Ins. Co.*, 13 Conn. 533-45. *Jennings v. Chenango Mu. Ins. Co.*, 2 Denio, 75. *Kennedy v. St. Lawrence Mu. Ins. Co.*, 10 Barb. 285. *Sexton v. Mont. Co. Mu. Ins. Co.*, 9 Barb. 191. *Wall v. Howard Ins. Co.*, 14 Barb.

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383. *Gates v. Madison Co. M. Ins. Co.*, 2 *Comst.* 43. *Wilson v. Herk. Co. Ins. Co.*, 2 *Seld.* 53.)

II. By the true construction of the eighth question and answers, the insured were bound to keep a watch in the mill all night, every night in the week, and the failure to keep a watch after twelve o'clock Saturday nights and before twelve o'clock Sunday nights, was a breach of the warranty, and discharged the defendants. This construction was given to the words by the court in Connecticut in the case above cited. (21 *Conn. Rep.* 19.) The plaintiff, on the trial, virtually conceded that this construction was right. The answers were the language of the insured, and, by a familiar rule of construction, are to be taken most strongly against the party making them. The ruling of the judge, that by the true construction of the survey the insured were excused from keeping a watch from twelve o'clock Saturday night to 12 o'clock Sunday night, was erroneous, and the exceptions were well taken.

III. The provision in the policy that no suit should be sustained against the company for any claim under the policy, unless commenced within twelve months next after the loss, is valid and binding. (*Gray v. Hartford Ins. Co.*, 1 *Blatchford*, 280. *Willson v. Ætna Ins. Co.*, 27 *Verm. R.* 99.) (1.) Such a limitation of the right of action is not contrary to public policy. (*Williams v. Vermont Ins. Co.*, 20 *Verm. Rep.* 222. *Leadbeater v. Ætna Ins. Co.*, 1 *Shep.* 267. *Worsley v. Wood*, 6 *Tenn. R.* 718.) (2.) Compliance with the provision on the part of the assured, is a condition precedent to his right of action, and no court of law or equity can dispense with the performance.

IV. The evidence admitted, to establish a waiver of the limitation, by the defendants was incompetent and irrelevant, and the defendants' exceptions thereto were well taken. (*Daves v. North River Ins. Co.*, 7 *Cowen*, 464.)

V. There was no evidence competent to show a waiver of the limitation, and the judge erred in submitting that question to the jury. There was *no evidence whatever* "of a pos-

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itive act of the defendants which was *intended to induce and did induce* the insured to postpone bringing the suit until after the expiration of twelve months." As the case showed that the insured commenced suit *within six months* after the fire, it was impossible to prove a waiver under the above charge.

VI. The finding by the jury of a waiver, was clearly unsupported by evidence, and directly against the charge of the judge, and was doubtless produced by the improper evidence admitted for other purposes.

VII. The plaintiff is the assignee of the Glendale Woolen Company, and can recover the loss of that company only on the buildings and machinery. The stock belonged to N. Sheldon & Co., and the loss was payable to them. The insured brought separate suits in Connecticut. The recovery should have been limited as prayed for by the defendants' counsel.

David Dudley Field, for the plaintiff. I. The exceptions to the charge, and refusal to charge, all depend upon the correctness of the decision respecting the construction of the survey. That construction was right. Taking the whole of the survey together, it is manifest that the parties never expected that there was to be a watchman after the commencement of the sabbath, at midnight, which was on the Saturday following. The word "*nights*" does not mean all the time of darkness, or natural nights. The word "*sabbath*" does mean all the time between 12 o'clock Saturday night, to 12 o'clock Sunday night. The answer to the 8th interrogatory is *not affirmative merely*. The rest of the answer is to be understood with qualifications, for the bell does not ring every hour on Sunday. The next answer showed that the mill was left alone on Sunday. The 9th interrogatory and answer show that the word "*daily*" has a restricted signification. In the answer to the 15th interrogatory, the word "*nights*" is used in a restricted sense. The questions are all asked with reference to the days of *work*, and the danger of *working* the mill.

II. The verdict was not only not against the weight of evi-

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dence, but most clearly in accordance with it. The trial occupied several days; and although most of the evidence was given upon a point which was afterwards taken from the jury, that which related to the waiver, abundantly sustained it. After the negotiations between the parties, the garnishee suits and the efforts made to remove them, it would be most inequitable for the defendants to insist that the lapse of the intervening time constituted a defense. The proof given came up to the affidavits made on the first trial, and which the general term held should have been received; and was sufficient to establish the waiver.

III. Besides, if it were necessary to take the point, the plaintiff submits that the twelve months' limitation could have no just application to this case, which is in effect an action to reform the policy, and thus recover the loss upon the policy reformed. The condition could not begin to take effect till the policy was made complete.

IV. And still another point might be well taken, that the defendants have deprived themselves of the privilege of the limitation, by rejecting the arbitration, which was equally a condition annexed to the policy, and both were accepted together. The defendants cannot justly claim the benefit of one, and repudiate the other.

By the Court, ROOSEVELT, P. J. This court at general term have decided that a stipulation requiring the insured to sue, if at all, in twelve months, although binding originally, may be waived by the language or conduct of the parties; and the jury on the second trial having found that in the present instance there was such waiver, we are now to inquire whether that finding and the rulings which led to it were warranted by the law and the testimony. A twelve months' statute of limitations, although assented to by the parties, operates as a forfeiture. It is therefore to be construed strictly. Slight evidence of waiver, as in other cases of forfeiture, will be sufficient to defeat its application. "A positive act of the defend-

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ants, intended to induce postponements," is not necessary. Silence on the subject, in the midst of negotiations for settlement during the year, however intended, was held by the general term to be competent evidence to go to the jury, and if competent, its weight was to be determined by them. The court, especially to aid a forfeiture, and a very harsh one, too, will not scrutinize very closely their verdict on such a point; nor, I may add, the rulings of the judge at the trial, unless very clearly erroneous. Dismissing, then, the question of the twelve months instead of six years' limitation, which was in effect disposed of in the order directing the second trial, I shall proceed to consider the case on its merits.

It is contended by the insurance company that by a stipulation in the policy, the insured were to keep a watchman in the mill every night; that the loss sued for occurred in the night time; that there was no watchman on the premises when it occurred, and as a consequence, that the company are not bound to indemnify. The fire, it is conceded, took place on the morning of the 8th of April, 1849, between 3 and 4 o'clock, and of course in the night time. It was, however, a Sunday; and the sabbath, it is contended, by express terms, as well as by custom, was excepted from the stipulation—a position, which, as it seems to me on both grounds, is well taken. The policy was based on a written survey, in the form of question and answer. To the question whether the mill was left alone at any time after the watchman goes off duty in the morning, the parties answered, "Only at meal times, and on the sabbath, and other days when the mill does not run." Literally construed, this language perhaps imports that the watchman, although off duty on the sabbath, was only so during the same hours as on other days—a construction which, it is supposed, is confirmed by the answer to another interrogatory, in which the parties, when asked whether there is a watchman in the mill during the night, respond, without exception, "There is a watchman nights." Now, it seems to me, that as the parties had the idea of the sab-

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bath in their minds, and as all the interrogatories were written down and all together read over before any one was answered, if it had been intended that any portion of the sabbath was to be violated by service labor, the expression used, instead of being merely "nights" would have been "every night," or perhaps still stronger, "every night, Sundays included." Suppose, speaking of a pre-eminently industrious mechanic, or even professional man, one should say that he worked hard o' nights, would any person understand that the expression was intended to convey the idea that he worked after 12 P. M. on Saturday, and before 12 P. M. on Sunday? All language, be it ever so general, has its implied limitations—and even the man who is "forever at work," rests some portion of the 24 hours, and some one day of the seven. If, then, he who is "forever at work," rests on Sundays, and before daylight as well as after, he who only works "of nights," must certainly be regarded as having the same privilege.

As to so much of the loss as arose from the destruction of the "stock," the indemnity by the express terms of the policy was payable, not to the mill owners but to Sheldon & Co., the owners of the stock. The mill owners, therefore, even if they desired to do so, could not assign the claim to the plaintiff. They occupied the same position in that respect as mortgagors, taking a policy in their own name, but with the customary clause, "Loss, if any, payable to A. B., mortgagee." A. B. and A. B. only in such case—the mortgage being unsatisfied—could maintain the action. Sheldon & Co., so far as respects the stock, were not only the sole parties in interest, but the sole parties to whom the insurers, in case of loss, had, as we have seen by the terms of the policy, contracted to pay. A new trial must therefore be granted, unless the plaintiff waives that portion of the damages found by the jury, which is applicable solely to the stock. If that be waived, judgment for the balance should be entered for the plaintiff.

[NEW YORK GENERAL TERM. May 2, 1859. *Roosevelt, Clerke and Pratt, Justices.*]

ROBINSON *vs.* GREGORY and others.

Where one of several partners goes abroad, and during his absence an unexpected emergency arises, upon which he cannot be consulted, the resident partners have power to make a general assignment of the individual and partnership effects, in trust for the benefit of creditors.

An assignment thus executed was sustained, where the absent partner, before leaving for Europe, gave to one of his partners a power of attorney, to execute for him all instruments whatsoever, and all and every act and deed of whatsoever name or nature, appertaining to his affairs; and when informed, by letter, that an assignment had been made, and asked to approve and confirm it, the absent partner expressed no disapprobation of the step which had been taken by his copartners; and he did not join in the application to set the assignment aside.

A PPEAL, by the defendants, from a judgment entered at a special term. The material facts appear in the opinion of the court.

By the Court, ROOSEVELT, P. J. The firm of Kelley, Townsend & Co., bankers and brokers in the city of New York, consisted of the three defendants, Kelley, Townsend and Stephens. On the 6th of January, 1857, their affairs having become embarrassed, and Kelly being absent in Paris, the two resident partners executed a general assignment of the individual and partnership effects, for the benefit of the creditors in the usual order of preference in such cases. One month afterwards, the plaintiffs recovered against the three partners a judgment for \$28,592; but as the summons in the action had been served only on the two who were present, the plaintiffs were confined in their remedy to the partnership property of the three, and the individual property of the two who alone were notified. Having failed, in consequence of the previous assignment, to realize any thing under their execution, they file this bill for the purpose of setting aside that impediment, and of thus obtaining, by judicial proceedings, for themselves, a preference, which their debtors had already, by voluntary assignment, granted to others. It is, therefore, on both sides, a contest, not for equality of distribution, but

preferential advantage; and the only question for determination is, which has the strict legal right?

There are certain powers of individual partners which admit of no dispute. One partner may make a sale of a portion of the partnership goods for cash, or on credit, or in payment for a partnership debt. And if he may make a transfer direct to the creditor, it would seem to follow that he may make a similar transfer to a third person in trust to sell and pay the debt. But a general assignment, it is said, implies a breaking up of the partnership; and that in such case, where a common trustee is to be appointed, all should be consulted, and if all cannot agree, a receiver should be appointed by a court of justice, subject to the law of equality of distribution applicable to receiverships. That may be, and probably, according to the weight of authority, is the general rule. It has, however, its exceptions. Where one of three partners goes to a distant country, and an unexpected emergency arises in his absence, he cannot be consulted. The partnership property, from necessity, must be disposed of without his express concurrence. He knows that when he leaves, his leaving is the grant of a power by implication to those he leaves behind, to be exercised, of course, reasonably and in good faith. He knows that in case of a stoppage of payment, any creditor, so far as the joint assets are concerned, may sue the absent as well as the present partners, and by the action or inaction of the present partners, obtain in effect an assignment *pro tanto* of the joint effects. Such an assignment, or quasi assignment, is provided for by express statute. And how can the court say that a species of distribution in the case of absentees is unlawful and unjust, when a statute, so far as the principle is involved, in effect enjoins it?

In view of this statute, it will be seen that all the preferred creditors might, like the present plaintiff, have brought their suit, and on the defendants waiving time to plead, there being no defense, have obtained an immediate judgment against the partnership assets. I see no objection to the resident part-

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ners, in good faith, doing that directly which it is clear they could thus by law accomplish indirectly. There are other grounds also on which the assignment in the present suit may be sustained.

First. The partner who alone could call it in question, does not join in the application to set it aside.

Second. When informed, by letter of the 10th of January, that the assignment had been made, and furnished at the same time with a list of the preferred creditors, and asked to approve and confirm it, the absent partner, instead of forthwith repudiating the transaction, if dissatisfied, immediately wrote to Mr. Townsend in terms of deep regret at the failure of the house, without uttering a syllable of disapprobation of the step which had been taken by his copartners.

Third. Before leaving for Europe, he executed to Mr. Townsend a power of attorney, which, interpreted by the light of surrounding circumstances, was clearly intended to meet every possible emergency; and which, in terms, also expressly authorized Mr. Townsend to execute for him all instruments whatsoever, and all and every act and deed of whatsoever name or nature "appertaining to his affairs."

The judgment appealed from should therefore be overruled, and the plaintiff's complaint dismissed, but without costs.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Davies and Clerke, Justices*]

DEMAREST and others vs. RAY, executor, &c. and others.

A sale of land may be made as well by an executory contract as by a deed of present bargain and sale.

A testator, by his will, authorized his executors, if they should think it advisable, "to *sell* such number of lots, not exceeding twenty," of 25 by 100 feet, as might be necessary to pay charges and assessments. *Held* that an executory contract, by the executors, for the sale of lots, was authorized by the will, and was, to the extent of the number of square feet embraced in it, and subject to the contingency of its possible non-fulfillment, an execution of the power; especially if the vendee was let into actual possession, and subsequent purchasers were duly informed of the facts.

The deed, in such a case, when delivered, relates back to the contract, and has the same effect against subsequent purchasers with notice, as if it had been delivered on the day of the sale.

When subsequent purchasers know that the power of the executors has been conditionally exhausted, they take their deeds subject to the chance of their being in part inoperative, in case the sales made to their predecessors shall be consummated by a fulfillment of the conditions.

THIS was a case settled and agreed upon by the respective parties, and submitted to the court under the provisions of section 372 of the code. It contained the following facts: On the 22d day of March, 1834, one Richard Ray, then of the city, county and state of New York, made his last will and testament, which contained, among other things, a clause "authorizing and empowering his executors, if they should consider it advisable, to sell such number of lots, not exceeding twenty, (such lots to be of dimensions not exceeding twenty-five feet by one hundred feet,) as might be necessary to pay charges and assessments." The testator died on the 21st of March, 1836, seised of certain real estate in the city of New York. The will was duly proved before the surrogate, and letters testamentary were issued by him to Robert Ray, one of the executors named in said will, on the 8th day of August, 1836, and to Mary Rebecca Ray, the executrix named in said will, on the 28th day of May, 1844. The executor, on or about the 25th day of March, 1837, executed and delivered a deed to John A. King, in consideration of the sum of twenty-five hundred dollars to him paid by said King, of ten lots of

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land lying adjacent to, and immediately in the rear of, ten other lots fronting on Twenty-seventh street; also another lot in the rear of a lot fronting on Twenty-eighth street. The deed was recorded in the office of the register of the city and county of New York, on the 1st day of April, 1837, and it stated that it was executed in pursuance and in execution of the authority and power contained in said will. The number of square feet contained in the two plots of ground, as described in said deed, was 11,075 feet, or thereabouts. On or about the 5th day of October, 1857, the executor and executrix executed and delivered a deed to Morgan Pindar of certain other lots, in consideration of the sum of \$49,500 to them paid by said Pindar.

On the 18th day of March, 1858, the executor made and executed with Nicholas L. Demarest and Joseph Smith, two of the plaintiffs, certain articles of agreement for the sale to them of the lots of ground therein described, upon the terms and conditions therein mentioned. The lots, the title to which was covenanted to be conveyed by said executor in and by said agreement, contained, together, an area of 9825 square feet, or thereabouts. In pursuance of said agreement the executor gave, and said Demarest and Smith took, immediate possession of the lots therein described; and thereupon, together with Daniel H. Smith and Washington Cooper, to whom said Demarest and Smith assigned an interest in said agreement, proceeded to improve, and did improve, the same, in compliance with the covenants contained in said agreement; and thereupon the executor and executrix executed and delivered to Demarest and Smith a deed in due form, for the conveyance to them of the title of a portion of the lots described in said agreement, and at the request of the said Demarest and Smith, executed and delivered a like deed to Daniel H. Smith and Washington Cooper, for the conveyance to them of the title to the remaining portion of the premises therein described, and covenanted to be conveyed. On receiving their deed from the executors, Demarest and

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Smith, in exchange therefor, and in compliance with their covenants in said agreement, delivered two bonds to said grantors, each of said bonds being duly executed by said Demarest and Smith, in the penalty of \$12,000, conditioned to pay said executor, his assigns or successors in office, the sum of \$6000 on the 1st day of August, in the year 1863, with interest thereon from the 1st day of August, 1858, at the rate of seven per cent per annum, payable semi-annually; each of said bonds was accompanied by a mortgage securing the payment of the said bond in the manner and at the time therein required, and each of said mortgages being duly executed by said Demarest and Smith and their respective wives. Smith and Cooper also executed their bond and mortgage to the executors, to secure the payment of the purchase money of that portion of the land which had been conveyed to them. These mortgages were duly recorded.

On the 22d day of March, 1858, the executor made and executed with William Bedell, Garret G. Vanderbilt, Cornelius Bedell, John Russell, James Gillies, Crowell Martin and Abraham Terhune, an article of agreement for the sale to them of certain premises therein described, which premises contained, together, an area of 12,344 square feet, or thereabouts. At the time the said last mentioned articles of agreement were made and entered into, the parties thereto had full knowledge that the said agreement, by and between the executor and Demarest and Smith, had been entered into and was then in due process of completion. That in pursuance of the agreement made and entered into as last above stated, the executor gave, and the said parties of the second part therein named took, immediate possession of the lots therein described, and thereupon proceeded to the improvement of the same, in compliance with their covenants with the executor in said agreement; and afterwards the said executor and executrix executed and delivered deeds to the said William Bedell, Garret G. Vanderbilt, Cornelius Bedell, Crowell Martin and Abraham Terhune, in due form, for the conveyance

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to each of them in severalty of the title to a portion of the lots described in said agreement, and to John Russell and James Gillies a like deed for the conveyance to them jointly of the title to the remaining portion of the lots described in said agreement. Each of said deeds bore date March 22d, 1858, and was acknowledged by said Robert Ray, as executor, April 14th, 1858, and by said Mary R. Ray, as executrix, April 16th, 1858. The deeds to the said William Bedell, Cornelius Bedell, Garret G. Vanderbilt and Crowell Martin, were all delivered to them respectively on the 4th day of August, 1858, and the deeds to Abraham Terhune, and John Russell and James Gillies, were both delivered by the said grantors, August 5th, 1858. On receiving which deeds the grantees executed their bonds and mortgages to the executors, to secure the payment of the purchase money. At the dates of the respective conveyances above mentioned, neither of the parties to this action, excepting the executors, had actual notice of the prior conveyances made by the said executors. The plaintiffs alleged that, under and by virtue of said will, the executor and executrix had originally full power and authority to sell and convey, if they should deem it advisable, twenty lots of land—such lots to be of dimensions not exceeding twenty-five feet by one hundred, making a total area of 50,000 square feet; that by the deed to John A. King was conveyed 11,075 square feet, or thereabouts; that by the deed to Morgan Pindar there was conveyed 27,156 square feet, or thereabouts; that by the agreement with Demarest and Smith there was covenanted to be conveyed 9875 square feet, or thereabouts; and that by the agreement of the 22d of March, 1858, secondly above set forth, there was covenanted to be conveyed 12,344 square feet, or thereabouts—making a total of 60,450 square feet, and being in excess of the power granted by said will of 10,450 square feet. And the plaintiffs claimed and insisted that at the time of the execution and delivery of the first agreement by the executor to Demarest and Smith, as above stated, said executor had full power, right and au-

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thority, under and by virtue of the will of Richard Ray, to sell and convey the premises described in said agreement; and that by said Demarest and Smith executing said agreement and complying with their covenants therein, the plaintiffs equitably became the owners of the lots therein described, and were entitled to the fee thereof, free and clear of all incumbrances of every kind and nature, and to have and to insist upon a full execution of said power of sale for the purpose of giving them such title thereto. The plaintiffs also claimed and insisted that, as the defendants William Bedell, Garret G. Vanderbilt, Cornelius Bedell, John Russell, James Gillies, Crowell Martin and Abraham Terhune, at the time of entering into said second contract of the 22d of March, 1858, and at the time of receiving their said deeds under the same, as above stated, had notice and actual knowledge of the rights of the plaintiff under the said contract of the 18th of March, 1858, they did not, nor could they, obtain any rights superior or prior to those of the plaintiffs, by obtaining or receiving an earlier delivery of their deeds; and that the deeds to the plaintiffs were, by reason of the facts hereinbefore set forth, legal, valid and binding, and had conveyed to and vested in the plaintiffs the title of their said lots in fee.

While, on the other hand, the defendants William Bedell, Garret G. Vanderbilt, Cornelius Bedell, John Russell, James Gillies, Crowell Martin and Abraham Terhune insisted, 1st. That the power of sale was only exhausted by the actual delivery of the deeds from the executors to the various purchasers, and in the order of such delivery. 2d. Assuming that by the true construction of the will the executors were authorized to sell 50,000 square feet of land, and that after the conveyance by them to Pindar there remained 11,769 square feet unsold, the power to sell the residue continued unexhausted until the 4th day of August, 1858, the date of the delivery of the deeds to William and Cornelius Bedell and Vanderbilt and Martin; and those deeds formed a valid execution of the power, to the extent of 8229 square feet, the

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gross contents of the land conveyed by them, and the residue on which the power of sale still remained unexhausted, viz. 4116 square feet passed by their deeds delivered August 5th, 1858, to the defendants Russell and Gillies and Terhune. 3d. That the existence of a mere executory contract for the sale by the executors of other lands to Demarest and Smith does not affect the titles severally conveyed to these defendants, or either of them, and it is immaterial whether the defendants had notice of such contract.

Wm. S. Hascall, for the plaintiffs.

C. J. & E. Dewitt, for the defendants Bedells and others.

Daniel Lord, for the executors of Richard Ray.

By the Court, ROOSEVELT, J. This is a case agreed upon and submitted under the code, without pleadings or arguments. We have given to it all the "consideration" which, without the aid of counsel, we could conveniently bestow, and have come to the conclusion that the points insisted on by the defendants are not well founded.

Mr. Richard Ray, by his will, authorized the executors, if they should consider it advisable, "to *sell* such number of lots, not exceeding twenty," of twenty-five by one hundred feet, as might be necessary to pay charges and assessments. A sale may be made as well by an executory contract as by a deed of present bargain and sale. The contract in question, therefore, being authorized by the will, was, to the extent of the number of square feet embraced in it, and subject to the contingency of its possible non-fulfillment, an execution of the power; especially if, as in this case, the vendee was let into actual possession, and subsequent purchasers were duly informed of the facts. The deed, in such case, when delivered, relates back to the contract, and has the same effect against

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subsequent purchasers with notice, as if it had been delivered on the day of the sale.

The defendants knew that the power of the executors had been conditionally exhausted. They took their deeds, therefore, subject to the chance of their being in part inoperative, in case the sales made to their predecessors should be consummated by a fulfillment of the conditions.

Judgment for the plaintiffs, declaring their right and title to be paramount to those of the defendants, and that the deeds to the plaintiffs are "legal, valid and binding, and have conveyed to, and vested in, the plaintiffs the title of the lots therein mentioned, in fee."

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Ingraham and Davies, Justices.*]

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THE MECHANICS' BANK OF THE CITY OF BROOKLYN
vs. TOWNSEND.

A certificate, given by the maker of a promissory note, at the time of executing such note, and annexed thereto, in which he states that the note is given for value and will be paid when due, will estop the party giving it from falsifying his own statements, and prevent his setting up the defense of usury against a holder who has discounted the note on the faith of the certificate, giving full value, under circumstances free from suspicion, and without any design to evade the statute.

THIS action was brought against the defendant as maker and indorser of two promissory notes made to his own order. The defendant alleged in his answer that the notes were made and indorsed by him and given to one Holley, a broker, to raise money upon; that Holley procured a loan from R. Sedgwick, upon the same, of \$700, (the notes amounting to the sum of \$1200,) at the usurious rate of two per cent per month; that no other consideration was ever paid by Sedgwick for either of said notes. On the trial of the cause

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the defendant proved that the notes in suit were made by him and given to Holley, a broker, to get discounted; that Holley borrowed of R. Sedgwick, on the two notes, the sum of \$700, at the rate of two per cent a month for the same, as long as he (Holley) had the money, and as security for such loan, transferred the said notes to Sedgwick. The plaintiffs then offered in evidence the certificates of the defendant, one of which was attached to each of said notes; each being in the following words and figures:

“New York, 16th February, 1856.

This is to certify that a note made by me this day for \$600, to my own order, payable in three months from this date, was given for value received, and will be paid when due.

(Signed) S. P. TOWNSEND.”

as an estoppel, estopping the defendant from availing himself of the usury proven by the witness Holley. The defendant's counsel objected to said certificates being received as evidence of such estoppel, on the ground that the same were not proven to be in the handwriting of the defendant, and that neither of said papers was delivered by the defendant to the plaintiffs, or intended by him so to be delivered; and further, that the plaintiffs had not shown or attempted to show that the notes were discounted by the plaintiffs, upon the faith of the statements contained in said certificates; and on the further ground, that the said certificates constituted no bar to the defense of usury, and were in no sense an estoppel. All of which objections were overruled by the court, and the evidence received. The jury found a verdict for the plaintiffs for \$1319.19; and from the judgment entered upon their verdict, at special term, the defendant appealed.

Taggard & Pinkney, for the appellants. I. The certificates ought not to have been received in evidence as an estoppel, because the same were not proven to be in the handwriting of the defendant: The witness called by the plaintiffs to prove the same, merely testifying that he believed the certifi-

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cate to be signed by the defendant, although by his testimony as to the signature of the notes, he admitted that he had sufficient knowledge of the signature of the defendant to testify positively to the same: Therefore his testimony as to the signature on the certificate was uncertain and insufficient to prove the same to be in the handwriting of the defendant.

II. There was no proof that either of the certificates was delivered by the defendant, or intended by him to be delivered, to the plaintiffs.

III. The plaintiffs had not attempted to show that they relied on the statements contained in the certificates. The president of the bank, who was called by the defendant, swears that he cannot say whether the bank discounted the paper upon the statements contained in the certificates or not. In order to conclude a party by an estoppel, it must appear that the party seeking to avail himself of the estoppel, has acted upon the admissions or statement. (*Wallace v. Truesdell*, 6 *Pick.* 445.) The plaintiffs do not show that they relied or acted upon the certificates. (*Truscott v. Davis*, (4 *Barb.* 495.) The fact that the note was accompanied by the certificate was sufficient to cast suspicion upon the same, and to suggest to the party to whom the same was offered that the note was tainted with usury or some other legal defense, and it therefore became the duty of the purchaser to inquire or attempt to inquire of the maker as to the facts of the case. In any case in which the indorsee takes the paper upon circumstances which might reasonably put the *holder* upon inquiry, and create suspicion that it was not good, he takes it at his peril. (*Ayer v. Hutchins*, 4 *Mass. Rep.* 370. *Napier v. Elam*, 6 *Yerger*, 108, 387.) This principal is of *general application*, and not confined to notes overdue. (3 *Barn. & Cress.* 466. 1 *Carr. & Payne*, 261. 13 *La. Rep.* 213, 216.)

IV. The statements contained in the certificates constituted no bar to the defense of usury, and were in no sense an estoppel. They are mere repetitions of the language and meaning of the notes, and contained no representations that the notes

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were business notes, or that the defendant had ever received the face of the same, less the legal discount; neither do they contain any representations or warranty whatever of the character of the notes, or the objects for which they were given, but a mere statement which would be true if the defendant had received but one dollar thereon; and estoppels being odious in the eyes of the law, (1 *Term Rep.* 604,) it is submitted that no forced construction can be given to the language contained in the certificates. "Every estoppel," says Lord Coke, "because it concludeth a man to allege the truth, must be certain to every intent and purpose and not to be taken by argument or inference." (*Co. Litt.* 352.) The words "value received" we find in almost every note to which the defense of usury has been pleaded, and in every such case ought to estop the defendant from claiming the advantage of the statute, as the words "value received" contained in a note might with much more force and reason be held to be an estoppel; for a note being negotiable, all the promises and statements therein contained are held to be made to any and every party who may become the lawful owner of the note, while the certificates in question are mere statements to the party to whom they were originally given, or to whom the negotiation for a loan on the notes was first made, there being no proof that the defendant intended they should be used for any other purpose. (*Miller v. Gaston*, 2 *Hill*, 188, and cases there cited and commented on as to negotiability of papers annexed to notes.)

V. There can be no estoppel to the defense of usury. The notes never had any legal inception until they were transferred to Sedgwick as security for the usurious loan, and are therefore void by statute the moment the fact showing usury appears. (*Powell v. Waters*, 8 *Cowen*, 669.) The defendant cannot by any declarations be prevented from taking advantage of the statute. A legal inception cannot be given to the note against the statute rendering the same void, by a mere declaration or admission of the defendant. (*Ruckman v.*

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Pitcher, 1 *Comst.* 392.) To allow a mere declaration or admission to give validity to a note or instrument where the statute makes the absolute promise of the party void, although made upon the receipt by him of a valuable consideration, it is necessary first to repeal the statute against usury. (2 *R. S.* p. 182, § 5, art. 14.)

VI. No cause of action can arise in favor of a party to an illegal contract; nor will the law lend its aid to enforce a contract or obligation which is in conflict with the terms of the statute. (*Ruckman v. Bryan*, 3 *Denio*, 343.)

Jared Sparks, for the respondent. I. The evidence of John B. Borst, one of the defendants, shows that he paid full value for the notes, to wit, \$800 in cash, and a barouche carriage worth \$400. The respondents (plaintiffs) discounted the notes in the usual way, at the rate of 7 per cent per annum.

II. The certificates attached to the notes were properly admitted in evidence. The signature of the appellant to the certificates was sufficiently proven. The witness Wining swears positively to the signature of the defendant on the notes, and that to the best of his belief the certificates attached are in the handwriting of, and signed by, the defendant. This is all the law requires. (*Johnson v. Daverne*, 19 *John.* 134. *Greenl. Ev.* 8th ed. 721, sec. 576 et seq. and cases there cited.)

III. The certificates being attached to the notes at the time of their transfer to Borst and to the plaintiffs, the law presumes they were made for that purpose. If they were not made by the defendant to accompany the notes, it was his duty to show it.

IV. The plaintiffs were not required to prove that they discounted the notes upon the faith of the statements contained in the certificates, any more than the holder of a note is compelled to show that he discounted it on the faith of the names of the indorsers. The certificates formed a part of the notes, and the law infers that the plaintiffs relied upon the contents

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of the certificates, as well as upon the belief of the genuineness of the notes, in the absence of proof to the contrary.

V. The statements contained in the certificates barred the defense of usury, and were an estoppel. The defendant is bound by the certificates, and cannot defeat his liability by denying the legality of the contract. He warrants the title and genuineness of the notes. (*Edwards on Bills and Prom. Notes*, 289, 290. *Chamberlain v. Townsend*, 26 Barb. 611, and cases there cited.)

VI. The certificates annexed to the notes have the same legal effect as if the defendant had informed the plaintiffs that the notes were business paper, and would be paid when due. The defendant is concluded from denying his own acts, after the plaintiffs were influenced by them, in discounting the notes. (*The Welland Canal Co. v. Hathaway*, 8 Wend. 483. *Tilton v. Nelson*, 27 Barb. 600. *Dezell v. Odell*, 3 Hill, 221. *Clark v. Sisson*, 4 Duer, 408.)

VII. Usury could not be shown under the pleadings; although the court granted the defendant leave to amend, the answer was not amended. It was only resworn to. When usury is set up as a defense, the party must allege the facts specifically, and prove them exactly as stated in the answer. The answer alleges that the defendant believes the notes were sold at a discount of from two and a half per cent to four per cent a month. This allegation is too general. No proof was offered by the defendant to show the usury alleged in the answer. (*Catlin v. Gunter*, 1 Duer, 253. *Curtis v. Masten*, 11 Paige, 16. *Vroom v. Ditmas*, 4 id. 526, 533. *Rowe v. Phillips*, 2 Sandf. Ch. 14.)

VIII. The question of usury was passed upon by the jury, and it being one of fact, the verdict will not be disturbed by the court.

By the Court, ROOSEVELT, J. The defendant Townsend is sued as maker, on two promissory notes. His defense is, that the notes were issued by him on a usurious consideration, and

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are therefore void even in the hands of a bona fide holder who may have discounted them at the lawful rate of seven per cent. To meet this objection, the plaintiffs, on the trial, introduced in evidence two certificates signed by the defendant, and which the jury in effect have found to have been given by him to accompany the notes, and to have been designed to represent that the notes were valid, (when in fact and to his knowledge they were invalid,) so that subsequent parties should take the notes on the faith of the certificates. It should be added, too, that the verdict in effect establishes the further fact that the plaintiffs discounted the notes on the faith of the certificates, giving full value, under circumstance free from suspicion, and without any design on their part to evade the statute, and without reason for suspecting such design in others.

Such a certificate, acted on in good faith, it has been repeatedly held, operates to estop the party giving it from falsifying his own statements. No man, as against an innocent person, can take advantage of his own fraud. So far from being, in such case, a defense, the fraud would itself, if any loss were sustained, be a positive cause of action entitling the injured party to equivalent damages. (*See the cases of Holmes v. Williams*, 10 *Paige*, 326; *Watson's Ex'rs v. McLaren*, 19 *Wend.* 557; *Dowe v. Schutt*, 2 *Denio*, 621; *Clark v. Sisson*, 4 *Duer*, 408; *Truscott v. Davis*, 4 *Barb.* 495.)

All these cases are cited by Mr. Justice Ingraham at special term, in a decision against the same defendant, reported recently in 26 *Barb.* 611.

Much stress is laid, by counsel, on the peculiar form of these certificates. They merely declare that the notes—and such, it is said, is the purport of the notes themselves—“were given for value received, and will be paid when due.” If nothing further was meant by the certificates, why attach them to the notes? The act would have been a childish ceremony. We must infer that it meant something. The jury have found, in effect, and we think correctly found, that the defendant meant to convey the idea not only that some value, but that full le-

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gal value, had been received, and that the promise to pay was not merely an optional promise, but one which could be legally enforced. In other words, the object of the certificate, as is said by Judge Ingraham, was "to induce a purchaser to take the notes without fear of the defense of usury." And it is not competent to the defendant now to argue that the terms selected were ingeniously contrived as a trap to catch the unwary.

Judgment appealed from affirmed with costs.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Ingraham and Pratt, Justices.*]

 BOSSANGE vs. ROSS and FITZGERALD.

Where accommodation paper is bought *bona fide* for a gross sum, which sum, on calculation, gives more than seven per cent, the transaction is usurious, and no recovery can be had against the parties to the note, for the amount actually paid, with lawful interest; if there has been no fraud or false representation, by certificate or otherwise, to mislead the purchaser.

It seems there is no real distinction—so far as usury in its civil aspect is concerned—between buying and discounting; the policy of the statute being equally defeated by the one as by the other.

THIS was an action brought by Bossange against Charles Ross and Elisha Fitzgerald, the appellants, and one Isaac Detheridge, who made no defense, to recover the amount of a promissory note, signed by Charles Ross, payable to Elisha Fitzgerald, and indorsed by him and also by Isaac Detheridge. The note was made by Ross and indorsed by Fitzgerald for the accommodation of Isaac Detheridge. The note was for \$650, for three months, and representing value received. About two weeks after its date, Detheridge sold the same to the plaintiff for \$600. He made no disclosure as to the consideration of the note, or that it was an accommodation note. The appellants set up usury as a defense. The judge instructed the jury, that if the note was *bona fide* sold by Detheridge to the

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plaintiff, and by the plaintiff purchased, he could recover the amount he had paid and interest, even though it was an accommodation note. The jury found for the plaintiff for \$600 and interest; and to this part of the charge the appellants excepted, and upon a hearing at the special term, Mr. Justice Roosevelt pro forma sustained the ruling of the judge at circuit. From the judgment so entered at the special term the defendants appealed.

Carpentier & Beach, for the appellants.

Gus. J. Thebaud, for the respondent.

By the Court, ROOSEVELT, J. The note sued on, although purporting as usual, on its face, to be for value received, was in fact accommodation paper. And the question is, if such paper be bought *bona fide* for a gross sum, but which sum on calculation gives, and is known to give, more than seven per cent, can a recovery be had for the amount actually paid, with lawful interest, as against all the parties to the note, where there has been no fraud or false representation, by certificate or otherwise?

On the trial the counsel for the defendants "excepted to that portion of the charge of the judge, in which he stated that if the plaintiff bought the note in question for \$600, (its face being \$650,) even though it was an accommodation note, he could recover from the drawer or indorser the amount actually paid, with interest."

In determining the correctness of this portion of the charge, it must be borne in mind that the judge also told the jury, that "if they came to the conclusion that Bossange discounted the note under an agreement to discount the same at a usurious rate of interest, then he could not recover." The verdict, therefore, must be construed as a finding that the transaction was a purchase and not a discount, if there be in truth any real distinction between the two; and that the pur-

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chase was not "a mere cover" for a usurious loan, but a *bona fide* contract of buying and selling, although at a rate which, treated as interest, would yield more than seven per cent for the use of the money.

Is there then any real distinction—so far as usury in its civil aspect is concerned—between buying and discounting? Is not the policy of the statute equally defeated by the one as by the other? It seems to us that it is. With the wisdom of that policy the courts have nothing to do. It is for them to enforce it, wise or unwise; unless the enforcement, as in the case of certificates, or oral representations of commercial paper, conflicts with another rule of law not yet repealed, that a man shall not allege, by way of defense, that he himself has been guilty of a falsehood, and is entitled to be rewarded for the offense.

The case of certificates or representations is an exceptional one, and of comparatively recent origin. And even this exception, the adoption of which admits the general rule to be otherwise, although sanctioned by several decisions, has never yet been finally established in the court of last resort. The general rule, just or unjust, that the purchaser of accommodation paper, without such certificate or representation, at a higher rate than seven per cent, takes it at his peril, is too well established to be now disputed. (*Hall v. Wilson*, 16 Barb. 548.)

In the present case it is not pretended that the maker and first indorser, who resist the claim, received any consideration or made any representation, written or verbal, to mislead the plaintiff. When sold, the note was not a subsisting security in the hands of the seller. Had it been then overdue, as there was no consideration, *he* could have maintained no suit upon it. To warrant a sale at a discount greater than seven per cent, the note at the time "must be perfect and available to the holder." (*Powell v. Waters*, 8 Cowen, 669.) When that is not the case, the transaction, although called a sale, is merely a contract that if A. will advance B. a certain sum of money, B., C. and D., parties to the note, will, at the end of

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so many days, repay a larger sum ; such larger sum when paid yielding more than seven per cent for the use of the money for the time specified. Such a contract is clearly usurious.

Judgment reversed and new trial ordered ; costs to abide the event.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Ingraham and Pratt, Justices.*]

KIP vs. MONROE & FLEMING.

In an action on an executory contract for the sale and purchase of stock in an incorporated company, by the vendor, the purchaser may show, in his defense, that at the time of making the contract, the charter of the company, and all its privileges, had, without his knowledge, been revoked and annulled, and the company itself been dissolved and abolished.

APPEAL from a judgment entered upon the report of a referee. The complaint stated that on the 4th day of March, 1856, the plaintiff, being the owner of 100 shares in the stock or capital of the Accessory Transit Company of Nicaragua, agreed with the appellant and Fleming, who were then partners in the business of buying and selling stocks in the city of New York, to sell and deliver to them, and they agreed to purchase, 100 shares of the said capital stock at the price of \$23 per share, and six per cent interest from March 4, 1856. The shares were deliverable, and were to be accepted at any time within thirty days from March 4, as the purchasers should elect ; that on the 3d day of April ensuing, the plaintiff tendered said shares to the purchasers at their office in the city of New York, and demanded the purchase money, \$2311.50 ; that the shares were not accepted nor the money paid. The difference between the contract price and the market price of the stock, at the time the contract matured, were sought to be recovered as damages to the amount

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of \$911, with interest from the 3d of April, 1856. The separate answer of the appellant Monroe denied every allegation in the complaint. It set up, as a defense to the action, that before the maturity of the alleged contract, the charter of the Accessory Transit Company of Nicaragua was revoked by the government of Nicaragua, and its stock became valueless, and the consideration of the alleged contract failed. It set up the further defense, that the plaintiff was not, at the time of the making of the alleged contract, and continuously thereafter until its maturity, in actual possession of the shares of stock, or entitled in his own right, or in the right of any third person, to sell them.

The referee found, as facts, the making of the contract, as stated in the complaint; that on the 3d day of April, 1856, the plaintiff tendered a certificate of 100 shares of said capital stock to the defendants, at their office in the city of New York, and demanded the purchase money therefor, and the defendants refused to accept said shares, and to pay the purchase money agreed to be paid, on the ground that they had met with losses, and were unable to receive and pay; that the 100 shares in the stock or capital of the company called the Nicaragua Transit Company, and mentioned in the contract between the parties, was understood and treated by them as 100 shares of the Accessory Transit Company of Nicaragua, and were the same and identical; that on the 3d day of April, 1856, the market value of said stock was \$14 per share; and that the plaintiff had suffered damages, by means of the failure of the defendants to fulfill their said contract with him, to the amount of \$970.52. And the referee found and reported, as matter of law, that the plaintiff was entitled to recover against the defendants the amount of damages suffered by the plaintiff, by reason of the defendants' failure to fulfill and keep their said contract with him, being the sum of \$970.52; and he ordered judgment for that sum, with costs. The defendant Monroe appealed from the judgment.

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M. V. B. Wilcoxson, for the appellant. I. The contract is void, because it violated the provisions of the statute against stock jobbing. (2 *R. S.* 710, § 6, 4th ed.) (1.) The just and effectual construction of that statute is, that the party contracting must not only own the stock at the time of its sale, but thence continuously until the contract matures, otherwise a temporary title, acquired merely for the purpose of making a sale, wholly defeats the purpose of the statute. (2.) It is true, the statute does not, in terms, apply to the sale of stock in foreign companies, yet the policy of the statute clearly applies to such a sale, and ought to vacate the contract; (*Mount v. Waite*, 7 *John.* 441;) especially in a case like this, where the entire business operations of the company were carried on within this state.

II. The contract was a mere wager or gambling contract, and is consequently void as against public policy, and the provisions of the statute against betting and gambling, and wagers on the price of stock. (2 *R. S.* 662, § 8; 710, § 7, 4th ed.) (1.) Neither party, at the time the contract was made, intended that the stock should be delivered; but the understanding on both sides was, that the difference between the contract and market price should be paid to the pretended vendor or purchasers, as the fluctuations in the price of the stock might determine. (2.) The presumption of good faith, arising out of the fact that the stock stood in the name of the plaintiff at the date of the contract, is destroyed by his having parted with it before the contract matured, and his having none standing in his name on the books of the company at its maturity; as also by the evidence, in the case, of the real nature of the agreement.

III. The contract is void under the statute of frauds, because the memorandum thereof is not signed by the defendant Monroe; neither is it expressed on its face to be signed by Fleming in his own behalf, and that of Monroe, but solely on behalf of Fleming.

IV. The referee erred in refusing to admit the evidence

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offered by the defendant, at folios 52, 53, 54 of the case. Mr. Monroe proposed to show that both parties to the contract, at the time it was made, contemplated and understood, as the very basis of it, the subsisting and operating legal existence of the Accessory Transit Company as an incorporated company, (and the sale and purchase necessarily implied this,) that it was possessed of a valuable charter franchise, of costly steam vessels, wharves and stores, and all the equipments of an extensive marine transportation company; when, in truth, before the contract was made, the company had been swept out of existence, its charter revoked, and its property had all been confiscated and appropriated by the government of Nicaragua to its own use. These facts, if proven, would have shown that the parties contracted in ignorance of material facts respecting the actual intrinsic state of the subject matter of the contract, and that the contract was therefore equitably rescinded.

V. The measure of damages, under the facts as disclosed in the case, should have been the plaintiff's actual damages; that is, the depreciation, if any, occurred in the market value of the stock standing in the name of Clerke, between the time of its purchase by the plaintiff to meet this contract, and the time when this contract matured.

VI. The referee erred in refusing to grant the motion of the counsel for the plaintiff to dismiss the complaint. The whole testimony in the case tends strongly to the conclusion that the alleged partnership, if it really existed, was formed principally for the purpose of gambling in stocks, and was consequently void, being against public policy.

H. G. De Forest, for the plaintiff. I. The proof is clear that the defendants were copartners.

II. The plaintiff being the owner of sufficient stock to fill the contract, at the time of the sale, it is a valid contract within the statute as to stock-jobbing. (2 R. S. 710, § 6, *marg.* 4th ed. *Frost v. Clarkson*, 7 Cowen, 24.)

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III. The statute in question applies only to shares in incorporated companies, incorporated under the laws of the United States, or one of the states. It does not appear, either on the pleadings or proofs, that the transit company was incorporated at all. If not incorporated, or if a corporation under the laws of Nicaragua, the statute does not apply. (2 *R. S.* 710, §§ 6, 7.)

IV. The referee properly excluded the testimony offered by the defendant, as to the decree of the Rivas government. (1.) The sale was of a chose in action, without any express warranty, and no fraud or concealment is alleged. (*Johnson v. Titus and cases cited*, 2 *Hill*, 606. *Cunningham v. Spier*, 13 *John.* 392.) (2.) It did not appear, nor did the defendant offer to show, that the transit company was a creature of the Nicaraguan government. Nor that the government of Rivas or Nicaragua had any right to revoke the decree. Nor that the shares were intrinsically less valuable in consequence of revocation. Nor that the depreciation in market value was occasioned by the alleged action of the government. Nor that the alleged revocation was not fully justified for causes specified in the charter. (3.) The shares sold were not distinct shares in the capital, or in the franchise, or in the property of the company; but merely a right to participate in the earnings, or, in case of a dissolution, in the assets. (*Angell & Ames on Corp.* 116, § 1.) (4.) For aught that appears, a revocation of the charter was a beneficial thing to the stockholders. (5.) It appears affirmatively that the shares had a fixed market value from the time of sale up to the time of trial.

V. The proof of tender of the stock was sufficient. The refusal of the defendants to take it, which is expressly alleged in the complaint and clearly proved, was a waiver of the tender. (*Stone v. Sprague*, 20 *Barb.* 509. *Holmes v. Holmes*, 12 *id.* 137.)

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By the Court, ROOSEVELT, J. The defendants, although partners, carried on their business in the sole name of Fleming; and the present action is brought on the following contract made by them in that manner:

"100 shares 23 B 30.

New York, March 4th, 1856.

I have purchased of Isaac Kip, jun., one hundred (100) shares of the stock of the Nicaragua Transit Company at twenty-three (23) per cent, payable and deliverable, buyer's option, in thirty days, with interest at the rate of six per cent per annum.

A. FLEMING."

On the trial before the referee the defendant offered to prove that the Rivas government (of Nicaragua) made a certain decree, a certified copy of which was produced, duly authenticated, and that this decree was promulgated in the public square of Granada, the place where decrees are promulgated, the residence of the government, about 18th February, 1856. That the government which made the decree was the government at the time, and had full power and right to make such decree, and that such decree had been carried into effect. The referee, however, excluded the evidence, and, as we think, erroneously. Had the decree been admitted, it would have shown, or at least would have tended to show, that at the time of making the contract, the charter of the company and all its privileges had, without the knowledge of the defendants, been "revoked and annulled," and the company itself been "dissolved and abolished." It would, in other words, have shown that the thing contracted for had substantially no existence. What the defendants bought, or agreed to buy, was 100 shares of stock in a living company, and not a proportionate, undivided interest in the remaining assets of a dead company in the hands of a receiver.

In the case of *Benedict v. Field*, (16 N. Y. R. 595,) the court of appeals held that, upon an executory contract for the delivery of goods, to be paid for on arrival, in the notes of a third party, if that party becomes insolvent before delivery, the seller is not bound to deliver the goods and accept the

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notes, although the notes at the time may not be entirely worthless. So that, stating the transaction in another form as an executory purchase of notes to be delivered and paid for in goods at a future time, the authority is precisely in point. The notes of an individual, and the stock certificates of a company, are equally choses in action, and so far as insolvency is concerned, stand on the same footing. The fact that the insolvency in the present case occurred before, instead of after, the date of the contract, can make no difference, as the defendants had no knowledge of the revocation till a subsequent period.

The report of the referee, and the judgment entered thereon, should be set aside and a new trial had; costs to abide the event.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Ingraham and Pratt, Justices.*]

RUNK and others, Receivers, &c. vs. ST. JOHN and others.

Receivers, appointed in other states, may sue as such, in the courts of this state.

A sheriff of this state has no power to sell upon an execution issued on a judgment recovered here, in an attachment suit, the real estate of a foreign corporation, situated in another state.

No portion of territory within another state can be levied upon, and sold, by virtue of any proceeding or judgment of the courts of this state.

Such a proceeding is entirely void; and any act, committed by citizens of this state, founded upon it, or induced by it, by which the owners are sought to be deprived of their land, should be declared equally void.

THIS action was brought by the plaintiffs as receivers of the president and managers of the New Hope and Delaware Bridge Company, to set aside a conveyance of land from the defendant Ansel St. John to the defendant Thomas P. St. John, as fraudulent and void as against the said New Hope and Delaware Bridge Company and their creditors. And the complaint prayed for a discovery and account and

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that the defendants might be decreed to convey the lands to the plaintiffs, &c. The answer of the defendants alleged that in an action commenced in the supreme court of this state, against the New Hope and Delaware Bridge Company, by a creditor, an attachment was issued against the real estate of the corporation; that a judgment was recovered therein by the plaintiff in that suit, upon which an execution was issued to the sheriff of the city and county of New York against the real estate of the corporation; and that upon such execution the real estate of the corporation, situate in the state of Pennsylvania, was levied upon by the said sheriff, and was sold by him, at the Merchants' Exchange in the city of New York, to the defendant Thomas P. St. John, who was the highest bidder at said sale; that the said Thomas P. St. John subsequently paid the amount of his bid, and received a deed of the land from the sheriff; and that upon his demand, the defendant Ansel St. John executed and delivered to him a conveyance of the said lands, which is the one sought to be set aside in this suit. And the defendant claimed that under and by virtue of the said proceedings and conveyances he was the lawful owner of the property. He also set up as a defense that the plaintiffs were foreign receivers, deriving their appointment from the laws or acts of foreign states, and are not and have never been by any law of this state, or any act of any court, or of any competent authority within this state, appointed receivers of the New Hope and Delaware Bridge Company, and that being foreign receivers as aforesaid, they had no rights of action within this state.

To this answer the plaintiffs demurred, on the ground that it did not state facts sufficient to constitute a defense. The issue of law being referred to a referee, he reported that the answer did not constitute a defense, and that the plaintiffs were entitled to the relief demanded in the complaint. The report of the referee was confirmed by the court, at special term, and judgment entered accordingly; from which judgment the defendant Thomas P. St. John appealed.

J. Mansfield Davies, for the appellants.

Schell, Slosson & Hutchins, for the plaintiffs.

By the Court, CLERKE, J. The plaintiffs are receivers of a corporation chartered in the states of Pennsylvania and New Jersey, and were appointed under a decree, dissolving the corporation, made by the court of chancery in the latter state, and were confirmed by an act of the legislature of the former. The defendants' counsel denies the capacity of receivers, appointed in other states and countries, to sue in the courts of this state. The laws and proceedings of other sovereignties have not, indeed, such absolute and inherent vigor as to be efficacious here under all circumstances. But, in most instances, they are recognized by the courtesy of the courts of this state; and the right of foreign assignees or receivers to collect, sue for, and recover the property of the individuals or corporations they represent, has never been denied, except where their claim came in conflict with the rights of creditors in this state. All that has been *settled* by the decisions, to which we have been referred on this subject, is, that our courts will not sustain the lien of foreign assignees or receivers in opposition to a lien created by attachment under our own laws. In other words, we decline to extend our wonted courtesy so far as to work detriment to citizens of our own state, who have been induced to give credit to the foreign insolvent. But this question does not arise in the case before us. This is not a contest between foreign creditors and domestic attaching creditors. The plaintiffs, on behalf of the interests they represent, seek the equitable interposition of this court to set aside an alleged fraudulent conveyance of land, situated in the state of Pennsylvania.

Actions by foreign trustees and assignees have in several instances been sustained in the courts of this state. In the case of the *New Jersey Lombard Bank v. Thorp*, (6 Cowen, 46,) trustees, appointed by an act of the legislature of the

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state of New Jersey, were allowed to be substituted as plaintiffs, instead of the corporation. This decision is expressly recognized and approved by the court of appeals in the well known case of *Hoyt v. Thompson*, (1 *Selden*, 341.)

The only question, then, is, have the plaintiffs a cause of action? The defendants' answer sets forth that an attachment against the real estate of the corporation, of whom the plaintiffs are receivers, was issued in an action commenced against the corporation by a creditor in this state, and that, on the recovery of a judgment against them, the real estate, which was situated in Pennsylvania, was sold by the sheriff of the city and county of New York under an execution; that the sheriff executed a deed of said lands to Thomas St. John, the purchaser at the sale, and that Ansel St. John, who held the lands as trustee of the corporation, thereupon executed a conveyance of the same to Thomas St. John. It appears that no new consideration passed from Thomas St. John to the company, as the trustee; but the latter executed the conveyance, solely to consummate more completely the sale of the sheriff.

But, surely, it is unnecessary to bestow any time in considering whether the sheriff of this county can obtain any lien or any right to land situated in another state, by virtue of any process of our courts. This court can no doubt set aside a fraudulent conveyance of lands in another state, executed in this state, when the parties are within its jurisdiction. But, it would be at variance with every principle, both of the common and international law, to hold that any portion of territory within another state can be levied upon, taken possession of, and sold, by virtue of any proceeding or judgment of the courts of this state. Such action is entirely void; and any act committed by citizens of this state, founded upon it or induced by it, by which the owners were sought to be deprived of their land, should be declared equally void.

The judgment should be affirmed, with costs.

PENNSYLVANIA COAL COMPANY *vs.* THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY.

There is no latent virtue in the word "toll," to exempt a contract in which it is employed, from the ordinary rules of construction; and a toll, like any other debt, cannot be demanded until its amount shall be ascertained. *Per* CLERKE, J.

The defendants (a canal company) agreed with the plaintiffs (a coal company) to allow the latter to transport coal on the canal of the former, in the same manner, and with the same facilities, as they themselves or any other persons might enjoy; providing specially for a rate of tolls, to be established *on the 1st of May in each year*, by ascertaining the quantity of lump coal belonging to the defendants, which at that period they should have contracted to sell, and to deliver at Rondout, by transportation on their canal, during that year. The average price per ton of those sales should then be ascertained, and from that average price two dollars and fifty cents should be deducted; and one half of the remainder should be the toll per ton to be charged by the plaintiffs, for the transportation of their coal during that year. In case the quantity of lump coal which, on the 1st of May, should have been sold, should be less than one half of the *estimated* sales for the year, then the toll, during that year, should be calculated on the average price per ton at which the sales should have been actually made. On a controversy arising, between the parties, under the latter clause of this agreement,

Held that the employment of the word "toll," in the agreement, did not, *ex vi termini*, give the canal company any right to the collection of it before its amount was ascertained; and it appearing that the amount of the tolls payable by the coal company could not be precisely ascertained before the expiration of the year, it was *further held* that the canal company could not, previous to that period, enforce immediate payment from the coal company, on account, by a *proximate estimate* of the tolls.

A PPEALS, by both parties, from a judgment entered at a special term, in favor of the defendants, for costs. The opinion of the court contains all the facts necessary to be stated.

A. H. Green, for the plaintiffs.

Hiram Ketchum, for the defendants.

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By the Court, CLERKE, J. The defendants agreed with the plaintiffs, in substance, as follows: To allow them to transport coal on the Delaware and Hudson canal, in the same manner, and with the same facilities, as they themselves (the canal company) or any other persons may enjoy ; providing specially for a rate of tolls, to be established on the 1st of May in every calendar year, by ascertaining the quantity of lump coal belonging to the Delaware and Hudson Canal Company, which at that period they shall have contracted to sell, and to deliver at Rondout, by transportation on their canal, during the year. The average price per ton of those sales shall then be ascertained. From this average price \$2.50 shall be deducted, and one half of the remainder shall be the toll per ton to be charged to the plaintiffs for the transportation of their coal during the said calendar year. So far the arrangement is very definite, and scarcely admits of any misconception.

But the agreement subsequently provides if the quantity of lump coal, which, on the 1st of May, shall have been sold, shall be less than one half of the estimated sales for the year, then the toll, during that year, shall be calculated on the average price per ton at which the sales shall have been *actually* made. Of course, in that contingency, no average could be struck until the expiration of the year.

There are other stipulations relating to the toll, but these are the only provisions to which it is important for us to advert.

It is under the contingency referred to in this latter clause, that the difficulty, which has produced this action, has arisen. We at once perceive that under the first clause, where the sales contracted for by the canal company, before the first of May, equal or exceed one half of the estimated sales of the whole year, the toll can be fixed at that time, and consequently they become entitled to payment of it, after the weighing of each cargo at Eddyville, where the weigh-lock is situated. But the Pennsylvania Coal Company contend when the quan-

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tity of coal contracted for by the canal company, before the 1st of May, is less than one half of the estimated sales for the whole year, and the rate of toll by the terms of the last mentioned clause cannot be fixed until the expiration of the year, that they are not bound to pay any toll until that time.

In the one case the toll can be precisely ascertained on the 1st of May, and payment therefor enforced in the ordinary way; in the other it is plain that it is incapable of calculation until the expiration of the calendar year. This inability, from the want of adequate data, in fact, occasioned the necessity of the provision, which both parties have alike recognized by inserting it in their contract.

The canal company insist, however, that they have a right to enforce immediate payment, on account, by a proximate estimate of the tolls, not venturing to deny that they can only at the expiration of the year be precisely ascertained.

But can this be granted in the absence of any express provision permitting it? Under any circumstances, can payment for the use of any thing, for the purchase of any property, for any service, or for any other benefit, be enforced, until the amount shall be absolutely ascertained? As a general rule, no one is obliged to perform a contract until its nature, limit and conditions are ascertained and prescribed. No debt can be legally demanded until its amount is capable of being estimated. If A. engages B. to go to Rome, and promises to pay all the expenses which he incurs on the route, B. cannot compel payment of any portion of his expenses until he completes the journey, unless he has taken the precaution to have it expressly understood that A. shall pay him the several portions of the outlay as they are incurred. I can discover no essential difference on the point involved between such a case and that now before us, except that the latter relates to tolls, which, it is said, necessarily imply immediate payment. Is there, indeed, any peculiar virtue in the word "toll," which gives it so potent an effect as to lift any contract, in which it is employed, above the ordinary rules of construction? And

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after sifting this case thoroughly, and disengaging it from all irrelevant topics, we shall find that this is the only question that remains for consideration.

Does the word "toll," which is employed throughout this agreement, import, *ex vi termini*, an instant collection, as soon as the weight of the cargo is ascertained at the usual place? "Toll" is a Saxon word, originally signifying a payment in towns, markets and fairs, for goods and cattle bought and sold there. It is defined in the Institutes to be a reasonable sum of money due to the owner of the fair or market, upon sale of things tollable, within the same. It is now, also, popularly applied to the charges which canal and rail road companies require for the transportation of goods, payable no doubt at once, in all cases, where there is no right or arrangement importing the contrary—precisely as goods sold are presumed to be sold for cash, unless by express terms, or from the circumstances of the case, the transaction shows a credit. The word means nothing more than a compensation for the privilege or service granted or rendered; and the period of payment depends entirely, as in every other case, upon the express or implied understanding of the parties. The right of the canal company, in this respect, is not at all enlarged by the charters which it has received from the states of Pennsylvania and New York. It is, indeed, permitted by these charters to exact certain tolls and rates, not exceeding three cents per mile, for every ton of ascertained burden in every vessel. But even in such cases, where the rate is fixed, the toll cannot be exacted until the burden is ascertained, so that the amount payable must be certain before it can be demanded. Nothing appears in these charters impressing on the word "toll" a signification which, *ex vi termini*, imports an immediate right of collection, where the terms of the contract are inconsistent with it. They do not, in other words, contain any immunities to the company, shielding them from the effect of the ordinary meaning of the language, or the ordinary consequences of the want of circumspection and care in

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the preparation of their contracts. The employment of the word "toll," therefore, does not, *ex vi termini*, give the canal company any right to the collection of it before its amount is ascertained. And as I have already intimated, the contract itself contains nothing from which it can be satisfactorily and legally inferred, that the parties intended, in the contingency contemplated in this clause of the agreement, that the tolls should be payable before the expiration of the year. To be sure, immediate payment is provided for in the first clause; but this is no reason why we should legally infer that this was intended on the happening of the contingency mentioned in the provision under consideration. Indeed, the presumption is at least as much in favor of the opposite supposition. In the one, immediate payment was expressly provided for, because the amount could be ascertained with certainty; in the other, it may be fairly assumed that immediate payment was dispensed with, and payment postponed until the expiration of the year, because the amount could not be ascertained with certainty until that time. And may it not be plausibly maintained, if the parties designed payment on account, by some proximate calculation, that they would have declared it? Their attention was, most manifestly, directed to the subject of payment, by contemplating the contingency; and, if they deemed it practicable and convenient, common prudence, of which we are not to presume any one destitute in matters in which important interests are concerned, would have required a suitable provision for this purpose, expressly set forth in the contract. For, assuredly, neither party would be willing to leave it to the interested conjectures of the other to make what is called a proximate estimate, without at least specifying some principles on which the computation should be made.

It would, indeed, have been more convenient for the canal company to receive the tolls, and it may be a very serious detriment not to have received them, as the weight of each cargo was successively ascertained at the weigh-lock in Eddyville; on the other hand, it would be equally convenient for the coal

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company *not* to pay them until their amount should be definitely ascertained. So far as it may be presumed such considerations operated on the minds of the parties in making this contract, they may be deemed counterpoised ; and a cautious reserve and silence might have been regarded by each as the best policy. Or, which is more likely, each might have been willing to trust to the liberality of the other, and not to rely, as to this point, on a strictly legal right. They are both respectable, wealthy, and powerful companies—not petty traders. We are not to suppose that the one apprehended hazard by the retention of the dues by the other until the end of the year, or that both were not inclined to yield material favors and forbearance, respecting an arrangement likely to endure for many years, of great magnitude, and of great advantage to both. If, under the first clause, immediate payment was yielded by the one ; under the contingency contemplated in the latter, a postponed payment may, with a very good grace, be yielded by the other. Generally, the canal company would receive immediate payment, as the method prescribed by the first clause would in the great majority of years obtain ; the method prescribed in the other, would be contingent and exceptional. Thus, occasionally, without any serious sacrifice of interest, it would be nothing unprecedented or extraordinary that they should wait for a few months, for payment, from their very safe and very profitable customer.

But, without indulging in any speculation on the possible intentions of the parties, it is enough for me to say that the language of the provision referred to necessitates no such construction as the canal company demand. There is no latent virtue in the word “toll,” to exempt a contract, in which it is employed, from the ordinary rules of construction ; and a toll, like any other debt, cannot be demanded until its amount shall be ascertained. Nothing more clearly demonstrates the wisdom of adhering to this rule, than the consequences which a departure from it would exhibit in this case. If the canal company are allowed to collect the tolls before their rate can

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be established, what amount shall be exacted, and who shall determine the amount? By a proximate estimate? By whom? Shall it be left to the arbitrary, perhaps biased, estimate of the interested party? The law abhors arbitrary power in the private as much as in the public relations. It allows no man to be a judge in his own cause; he must await the arbitrament of disinterested authority. The canal company demanded, as a proximate estimate, 55 cents per ton, on their own mere conjectural computation; they afterward reduced it to 50. They might as well have demanded 60 or 70. They had no more authority to demand 50, than the coal company had to insist on the payment of 40. Neither, in short, could coerce the other, until the amount actually payable should be ascertained in the manner prescribed in their contract.

The judgment of the special term should be reversed without costs; and as all the facts necessary to the adjudication of the case have been ascertained at the trial, and as it has not been brought for review before the general term upon any allegation of error on the trial, in the process of ascertaining facts, there is no necessity for ordering a new trial.

Judgment therefore should be entered for the plaintiffs without costs. (*Marquat v. Marquat*, 2 *Kernan*, 336.)

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Davies and Clarke*, Justices.]

KENT vs. G. W. and T. H. MANCHESTER.

Principles which govern courts of equity, in *reforming agreements* on the ground of inadvertence and mistake.

THE plaintiff sold to the defendants a farm, with the stock, utensils, &c., by a contract which embraced in its terms all the *personal property* on the farm and in the house, save a few articles specially excepted by name. The purchasers

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claimed the *household furniture*, and the vendor insisted that such was not the contract, but that the furniture was intended to be excepted. This action was brought for the purpose of having the contract reformed, on the ground of mistake and inadvertence.

Pomeroy & Hunt, for the plaintiff.

Smith & Kernan, for the defendants.

BACON, J. The complaint in this case is filed to procure the reformation of a contract entered into between the parties concerning the sale of a farm and certain personal property by the plaintiff to the defendants. The allegation, in substance, is, that the proper clauses to carry out and express the true bargain and agreement between the parties were omitted through inadvertence and mistake on the part of the plaintiff, and through inadvertence and mistake or fraud on the part of the defendants. The allegation as to fraud may, however, be dismissed, inasmuch as there is no testimony whatever to uphold any such suggestion, and the counsel of the plaintiff, on the argument, very frankly and properly waived any such pretense. The case, then, is to be treated purely as an application for relief, addressed to the equitable powers of the court, grounded on the allegation of inadvertence and mistake.

The power of the court to grant relief, in such cases, is now well established, although it was for a time looked upon with disfavor, as being in conflict with the sound principle of the common law, which precludes parol evidence to add to, or vary, the terms of a written contract. The rule was of necessity, and from the highest dictates of justice, relaxed in the case of a fraudulent suppression of the true and actual terms of a contract, or the incorporation of stipulations never within the agreement or contemplation of the parties, and upon a like ground of principle—to advance justice and prevent sur-

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prise and injury—the rule was extended to cases of innocent accident, inadvertence or mistake.

But in extending the rule to this class of cases, it was found to be quite necessary to qualify it with conditions, lest it should work more injury than it would be likely to redress. Among these are the following :

1. Relief will be granted in the case of written instruments, only where there is a plain mistake, *clearly made out by satisfactory proofs*.

2. The mistake must not only be established to the satisfaction of the court, but it must be a *mutual mistake*. It is not enough for the plaintiff who seeks relief to allege that by inadvertence and mistake on his part he was led to execute a contract which did not express the real agreement of the parties ; but it must be alleged and proved that the other party also labored under a mistake. So strongly has this rule been sometimes held, that Lord Thurlow, in one case, (*Shelburne v. Inchiquin*, 1 *Br. Ch. Cases*, 347,) declared that the difficulty of proof was so great, that “there was no instance of its prevailing against a party insisting that there is no mistake.” This is not now held with such stringency ; for an answer denying any mistake may doubtless be overcome, but it must be by very strong and most satisfactory proof.

3. Ignorance of the law is no ground of relief. If a party labors under a mistake of fact, and executes a contract with a clear understanding of its provisions, he can ask no dispensation from its requirements, nor seek to vary its terms, because he did not suppose the language employed really meant what its terms import. The courts do not undertake to relieve parties from their acts performed with a full knowledge of the facts, and where neither surprise nor fraud exists, through a mistake of the law.

4. When a contract, whose terms are manifested by writing, is sought to be changed and reformed, it should be made clearly to appear what the real contract was. Its terms should be definite and precise ; and it will never answer for a party to

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call upon a court to spell out a contract, or for the court to impose upon the parties one which neither of them has really made.

These rules are, in substance, to be found laid down by most of the elementary writers on the subject in question, and are abundantly sustained by authority. It will be sufficient to refer generally to 1 *Story's Equity Juris.* §§ 155 to 166; 2 *John. Ch.* 51, 274, 585, 630; 6 *id.* 169, 170; 11 *Paige*, 658; 17 *John.* 377; *Hopk.* 134. There is in truth no struggle in regard to the legal principles involved in this case, and the only difficulty I have encountered is so to reconcile the facts of this case as to afford the relief the plaintiff seeks. The main facts testified to by the plaintiff are unquestionably true, and the evidences of sincerity and integrity which characterized his appearance on the stand were such as to command my respect and confidence. Indeed, my impression amounts almost, if not quite, to absolute conviction that he never intended to include his household furniture among the personal effects which the bargain embraced. His conduct throughout, with perhaps an occasional instance of silence where it would have been natural for him to have spoken, was consistent with this theory.

In the early interviews with Stephen Manchester which preceded the actual making of the contract, the property designed to be parted with was unquestionably designated and the prices substantially adjusted, and the sum total of the purchase corresponds, with singular exactness, to the amount invested in the contract. The evidence, however, fails to show with equal clearness that the items and amounts were named over, and assented to by the defendants at the time the contract was actually drawn up, and when the minds of all parties were necessarily concerned in adjusting its terms and limiting its precise extent.

The storing of the furniture in the rooms at the house is also a circumstance of great significance, as bearing upon the conclusion of the plaintiff's mind as to the subject matters

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embraced in the contract, as well as the fact that he assumed to dispose of, as well as to remove from the premises, portions of personal property which would seem to be clearly within the terms of the contract. If the deposit of the furniture had been in pursuance of an agreement made with the defendants, or if, being apprised of the fact and the object of it, they had objected to such disposition, it would have afforded somewhat persuasive evidence that they understood the contract as the plaintiff testifies that he did. The testimony fails, however, to establish either of these points.

On the other hand, I am met by facts and considerations difficult to be reconciled with the position taken by the plaintiff, and more difficult to harmonize with the legal principles which are held to govern cases of this description.

1. Both the defendants, in their answer, explicitly, and in the strongest manner, deny that the contract, as drawn up and executed, does not express the true agreement of the parties; and they deny that any language was used that was not fully understood; or that any thing was omitted through inadvertence or mistake. And this denial in the answer is supported and fortified by the testimony of both Stephen and Thomas Manchester, and to a considerable extent is sustained by the testimony of Hadley, the scrivener who reduced the contract to writing.

2. The plaintiff himself had by far the most active agency in dictating, not only the general terms and provisions of the contract, but the precise clause which was inserted therein, and upon which the question has arisen. The change in the mode of drawing up the contract was undoubtedly unfortunate; and had the original purpose been pursued, it is probable all future difficulty would have been avoided. By whom the change was suggested is not clear; but there is no reason to think there was any improper or covert object in view in that suggestion. At any rate, the plaintiff acquiesced in it; and when called upon to name the property excepted from the sale, he did so deliberately, and the scrivener followed im-

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plicitly his dictation. When asked if the contract embraced all the excepted property, he replied in the affirmative. The entire instrument was read over twice at least, and deliberately executed, and the parties separated without a suggestion that it did not contain the contract, fully and entirely, of all the parties thereto.

3. Assuming now, as we may, that the plaintiff did not believe or understand that the contract embraced his household furniture, and that if he had so supposed, he never would have executed it, we are met, on the other hand, by the equally explicit declaration of the defendants, that if they had not understood the contract to embrace the furniture, it would not have been executed on their part. The explanation of the state of the plaintiff's mind, and the conclusion he formed, is very probably to be found in the fact testified to by him, that he was not sure that by the expressions, "all personal property of every name and nature now on the premises," the household furniture would be included, although when recalling this language, he was troubled with the strange fancy that it might embrace his bonds and mortgages; and this was in truth the main ground of his solicitude. If this was the error under which he labored, it was not a mistake as to the fact, that language was employed in the contract which he fully understood, and which would in truth embrace the furniture, but it was a mistake as to the legal import of the words; and this is one of those kinds of mistake for which the courts have no remedy. It is a mistake of the law, and not of fact, and is beyond the reach even of equity.

4. Again; the evidence leaves it uncertain even as to what the plaintiff claims the contract should have been. In the complaint, the language which it is insisted the court should direct to be inserted is put in two different forms, and the alteration asked for by the plaintiff, in his interviews with the defendants, differs from both the alternatives suggested by the complaint. All this exemplifies and illustrates the difficulty in which we become involved the moment we leave the written

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contract, and undertake, by the light of outside parol evidence, to determine what were its real terms and conditions. This difficulty is so great that, except in a most clear and almost uncontradicted case, it is safer, as a general rule, to leave the writing to be the interpreter of the parties, than to allow its terms to be varied by evidence, in its nature less satisfactory, and in ninety-nine cases out of a hundred, far less to be relied upon. Occasional injustice may doubtless be wrought, and honest but simple minded men be overcome by the crafty or the astute; but it is on the whole better to abide by the rule, "*littera scripta manet*." Recollections are sometimes vague, and impressions deceitful and illusory, but the written word stands, and speaks a uniform language. "To alter a clear written contract," says Chancellor Kent, in a case very similar to this, "without proof of the alleged new agreement, and when the charge of mistake is denied in the answer, would be destructive to the certainty and safety of written contracts."

Upon the whole, then, although with some hesitation from the consideration I have above alluded to, I have come to the conclusion that the relief asked for in the complaint must be denied, and the complaint dismissed. But, under all the circumstances, I am willing, as was the chancellor, in *Lyman v. United States Ins. Co.* (2 John. Ch. 634,) that it should be without costs; and a judgment to this effect may accordingly be entered.

FRANCES R. BISSELL, adm'x, &c. *vs.* THE NEW YORK CENTRAL RAIL ROAD COMPANY.

Where an individual who had shipped cattle for transportation upon a rail road was riding free in one of the cars of the company, for the purpose of taking charge of the cattle, under an agreement by which he assumed to do so at his own "risk of personal injury from whatever cause," and by virtue of a passage ticket having a notice indorsed thereon, stating that he assumed "all risks of accident," and agreed that the company should not be liable, "under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person" &c., and was killed by means of a collision between two trains of cars, through the gross negligence of the agents and servants of the company; *Held* that the injury arose from a cause not within the risk, and constituted a good cause of action in favor of the administrator of the deceased, against the company.

Held also, that neither the contract, nor the ticket, could be construed as referring to injuries resulting from negligence criminal in its nature, and which would have subjected the guilty agent to indictment and punishment under the statute.

The case of *Welles v. The New York Central Rail Road Company*, (26 Barb. 641,) commented upon, and distinguished from the present case. *Per* SMITH, J.

A PPEAL from an order made at a special term, denying a motion for a new trial. On the 5th of September, 1856, Josiah L. Bissell, the husband of the plaintiff, took passage on the defendants' rail road, from Buffalo to Albany, upon a ticket received from the defendants, which read on its face as follows:

"New York Central Rail Road. Cattle Dealer's Ticket on Passenger Train. Good for two days from date. Conductor will pass Taylor & Bissell, owners of two cars of live stock, from Buffalo to Albany.

[*Not transferable.*]

If presented by any other person than the one named herein, the conductor will take it up and charge the person holding the same the regular fare. Sept. 5th, 1856. D. L. FREMYRE.

[*Turn over.*]

E. CLARK, jr. Agent."

The following notice was printed on the back:

"The owner of stock receiving this ticket assumes all risks

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of accident, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the stock of said owner, shipped by stock or freight trains."

On the same day Bissell shipped on board of the defendants' cars, for the firm of Taylor & Bissell, two car loads of cattle, and signed a printed agreement, relative to the transportation of the cattle, which contained the following clause: "And it is further agreed between the parties hereto, that the persons riding free to take charge of the stock, do so at their own risk of personal injury, from whatever cause." On the same day, at about 10 o'clock in the evening, while said Bissell was sitting in the passenger or emigrant car attached to the freight train which carried the cattle, at Port Byron, in Cayuga county, which was waiting for the express passenger train from the west to pass, the express train came up, and the locomotive attached to the express train ran into the car where Bissell was, and killed him and five others. This action is brought under section one of the act of 1847. (*Sess. Laws of that year, ch. 450, p. 575.*) The jury found that the death of Bissell was caused by the *gross negligence* of the agents and servants of the defendants. The circuit judge, in his charge to the jury, stated to them the different degrees of negligence as recognized by the common law, and that the defendants could only be held liable for gross negligence. The deceased left a widow, who is the plaintiff in this action. The jury found a verdict in favor of the plaintiff for \$5000 damages. The defendants moved for a new trial, and the motion being denied, they appealed to the general term.

Cox & Avery, for the appellants. I. As to their *freight and cattle trains*, the defendants are not common carriers of passengers, nor bound to make any provision to receive and transport them. The exercise, therefore, of that strict watchfulness and exact care, which the law requires of common car-

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riers, cannot be required by a person casually riding in these trains. (*Murch v. Concord R. R. Co.*, 9 *Foster*, 9.) The deceased not being a passenger, but riding in the transportation of his live stock, under a special contract defining respectively the rights and duties of the parties, the ordinary implied obligation of common carriers can have no application to this case, further than as required by other rules of law which may *qualify and restrict the power to contract*.

II. The ordinary and extraordinary risks of life, limbs and property, *incurred by those engaged in the transportation* of passengers and property, by sea and land, being in the nature of things, practically inevitable, and necessarily taken, assumed and borne by somebody, are as legitimate subjects of contract as any other contingencies whatever.

III. The general rule, that where one employee is injured by the carelessness of another, the common employer is not responsible, is now too well settled to be disputed. (*Farwell v. Boston and W. R. R. Co.*, 4 *Metc.* 49. *Coon v. Syracuse and Utica R. R. Co.*, 1 *Seld.* 494. *Russell v. Hudson R. R. Co.*, 17 *N. Y. Rep.* 134. *Gilshannon v. Stony Brook Co.*, 10 *Cush.* 228. *Albro v. Agawam Co.*, 6 *id.* 72, and cases cited.)

IV. The foundation of this rule is held in these cases to be, that the party *has contracted* to assume and bear all the risks which are practically incidental to the business. The reason is that the servant *undertakes*, as between him and the master, to run all ordinary risks of the service, including the risk of negligence of the other servants engaged in discharging the work of their common employer. (*Wigget v. Fox*, 36 *Eng. L. and Eq.* 492. *Hutchinson v. Railway Co.*, 5 *Exch.* 351. *Farwell v. Boston and W. R. R. Co.*, 4 *Metc.* 56. *Coon v. Syr. and Utica R. R. Co.*, 1 *Seld.* 495. *Russell v. Hudson Riv. R. R. Co.*, 17 *N. Y. Rep.* 137.) By these cases, the principle that these risks *lie within the sphere of lawful contract*, is established too strongly to admit of animadversion or debate. No countenance will be found in any of these cases for a distinction on principle between what may be called "*gross neg-*

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ligence," and negligence of any other grade. Such a distinction, in its own nature, must be arbitrary, shadowy and vague; depending upon the caprice, temper or passion of differing men, and incapable of being reduced to practical usefulness, because incapable of *a priori* estimation. Modern authorities condemn and repudiate the distinction. (*Mayne on Dam.* 92 *Law Library*; *Austin v. Railway Co.*, 11 *Eng. L. and Eq.* 506, where the cases are collected and compared. *Wylde v. Pickford*, 8 *Mees. & W.* 443, 461, 2. *Wilson v. Brett*, 11 *Mees.* 113. *Whitney v. Lee*, 8 *Metc.* 91. *Hinton v. Dibber*, 2 *Q. B.* 646. *Touilleries Droit Civile*, 6th Tome, p. 639. 11 *id.* p. 203. *Mackeldy Manual, du Droit Roman*, 191.) And this court as well as the rest. See *Welles v. N. York Central R. R. Co.*, (26 *Barb.* 643,) where the authorities are compared and the distinction condemned. "It may be doubtful whether between *gross negligence* and *negligence*, any intelligible distinction exists. (*Per Ld. Denman, Hinton v. Dibber*, 2 *Q. B.* 647. See also *Austin v. Man. and Liverpool R. R. Co.*, 70 *Eng. Com. Law Rep.* 475, 6, *per Creswell, J.*; *Wilson v. Brett*, 11 *Mees. & Wels.* 115, *per Wolfe, J.*)

V. If the deceased had contracted with the defendants to go that trip from Buffalo to Albany, *in charge of the cattle*, (without having any interest in them,) we have seen that he could maintain no action against the defendants for personal injuries sustained by the negligence of any agent or servant of the defendants. (*Cases cited under point 3.*) He could probably indeed maintain an action against such servant or agent; in this case against Fogarty, the switchman. Nor would the fact of the dissimilarity or want of relation between the business of the *cattle tender* and that of the *switchman*, avail him, in an action against the company, unless provided for in his contract, (*Russell v. Hudson River R. R. Co.*, 17 *N. Y. Rep.* 137;) which shows that such want of relation is only to be regarded in view of the limits of the *implied* contract. But in the case at bar the contract is express, and unquestionably includes the particular risk. As to injuries *to the cattle*, the

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contract was lawful and binding. (*Dorr v. N. J. Nav. Co.*, 1 Kern. 485.) Unless, therefore, the incident of ownership in the cattle creates a disqualification to contract in regard to personal injuries resulting from negligence, this action cannot be maintained without overthrowing the law. The deceased was *pro hac vice engaged in the business* of transporting property; and by his contract expressly recognized that relation, and took upon himself all the risks incidental to the business. This was neither a passenger train, nor a freight train, but a *cattle train*. As to casual *passengers* on freight trains, and freight on passenger trains, see *Elkins v. Boston R. R. Co.*, (3 Foster, 275;) *Murch v. Concord R. R. Co.*, (9 id. 9, and cases cited.) The case of *Welles v. N. Y. Central R. R. Co.*, (26 Barb. 643,) differs from the case at bar in this, viz: Welles was on a regular passenger train, and agreed to take the risk if he could ride *free of charge*; but he was a *passenger*. Bissell was on a *cattle train* to look after and take care of cattle; his position was necessary to the transportation of his property; either he or some other man *must have* occupied that position; the risk he took was *necessarily taken* by somebody, and before the law all men are equal. It will be seen that the case at bar is much stronger for the defendants than the Welles case, since the public interest is strongest in respect to passenger trains; and passengers are not only unsolicited, but actually not allowed on cattle trains. It is obvious that Bissell was in no sense a *passenger*; but an attendant upon cattle. *A fortiori*, therefore, the *Welles* case is decisive of this, upon principle.

VI. The motion for a dismissal of the complaint should have been granted at the trial, for the *first* reason there given. The others have been considered. (*Shaw v. North Midland R. R. Co.*, 66 Eng. Com. Law, 347.) For the cause of action as shown by the proof, differed from that stated in the complaint, *in its entire scope and meaning*. (Code, section 171.) (1.) The contract declared upon was of a *passenger*. He was not a passenger. (2.) In a *passenger train*. It was not such

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a train, and the difference was essential. (3.) For a reasonable hire or reward. He rode *free*, to take charge of the stock. (4.) The complaint stands on the *implied* contract growing out of the relation of common carriers of passengers. But in fact the contract was express, special and in writing, and negatived the relation of passengers. If a more bald and patent case of variance "in entire scope and meaning" was ever brought into court, we have never known of such; and it must be remembered that all this was known to the plaintiff; and the inference is irresistible that the fictitious case brought into court was *deliberately preferred* to the true one. Unless, therefore, this court is prepared to extend the liberal statutes relating to amendments, to cases where the plaintiff *intentionally avoids* stating the case as it is, the complaint should have been dismissed, as for a failure of proof.

VII. The court erred in repeatedly declaring from the bench the opinion of the judge on the question of fact.

VIII. The court erred in each of the refusals to charge the jury as requested by counsel for the defendants.

C. Tucker, for the plaintiff. I. The defendants cannot, by special contract, limit their liability for the consequences of negligence of the character established in this case. By 2 *R. S.* 662, § 19, it is provided, "That every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter." There can be no doubt but that the agent of the defendants, whose culpable negligence caused the death of Bissell, is guilty of a felony, and would be answerable criminally under this statute. It is equally clear, if the contract had been made with him personally, that it could not shield him from liability in a civil action. (2 *Parsons on Cont.* § 12, p. 263, and cases there cited.) It has been held that in the case of carriers of property, such as live stock, the carrier cannot by contract limit his liability for the want of ordinary care. (*Sager v. Portsmouth, &c. R. R. Co.*, 31 *Maine R.* 228; *S. C. 1 Am. Railway Cas.* 171.)

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In that case the court say, "The very great danger to be anticipated by permitting them to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be over estimated. It would remove the principal safeguard for the preservation of life and property in such conveyances." This, like the case now before the court, was a corporation carrying on its business by agents only. The farthest any of the courts in this country have ever gone is, to permit common carriers to limit their extraordinary liability as insurers of the property intrusted to them. (*Dorr v. New Jersey Steam Navigation Co.*, 1 Kern. 485.) So rigidly has it been deemed necessary to hold carriers to the strictest liability, that until the decision of the case last cited it was doubted whether common carriers could limit by contract their extraordinary common law liability. (*Cole v. Goodwin*, 19 Wend. 251.) In this case it was declared to be well settled, "that a carrier could not, even by special agreement, exonerate himself from the consequences of gross neglect," and that still is the rule in this country, unless it may be said to have been overruled in the case of *Welles v. The New York Central Rail Road Company*, (26 Barb. 641.) In that case the judge who wrote the opinion held, that if the passenger had not been riding on a free ticket, the contract would not have shielded the company. In the present case, the passenger was not riding on a "free" or gratuitous ticket. It is not called a "free" ticket, as it was in the case last cited, and the presumption is that it was paid for. A gift is not to be presumed. Its very name, "*Cattle dealer's ticket*," imports that a consideration had been paid for it. The employment of the defendants to carry their cattle is a sufficient consideration. It is a right that the drover acquires by the employment of the defendants to carry his cattle for hire; at least this will be presumed, in case all other considerations were negatived. Why is it not called a "free ticket," like that in *Welles v. N. York Central R. R. Co.*? Simply because it was not a free ticket. The clause near the bottom of the contract, "persons riding free

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to take charge of the stock, do so at their own risk of personal injury, from whatever cause," does not prove that Bissell was riding free; and besides, it is a mere admonition to persons generally, without any reference to the parties to that agreement. It does not intimate that the ticket is a free ticket, or without consideration. It probably had reference to hired men, not named in the ticket or the contract. The true construction of this clause will not include injuries resulting from negligence. (*Sager v. Portsmouth, &c. R. R. Co., above cited.*)

II. The defendants are liable in a civil action, to the full extent, for all the damages caused by the negligence of the agent. (*Philadelphia and Reading R. R. Co. v. Derby*, 14 *How. U. S. Rep.* 486. *Steam Boat New World v. King*, 16 *id.* 469. *Thomas v. Winchester*, 2 *Seld.* 409.) In 14 *How. U. S. R.* 486, the court use the following language: "The rule of '*respondet superior*,' or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful." (*See also Story on Agency*, § 452; *Smith on Master and Servant*, 152.)

III. An agreement that the defendants shall not be liable for the negligence of agents, is in fact an agreement that the defendants shall not be liable for their own negligence; because they can only act through agents, and every agent is the corporation, while acting for it. These agents are the creatures of the defendants, and are selected by them; and one of the strongest inducements for the selection of capable and faithful agents, is the liability of the principal for the consequences of his conduct. It is as much against public policy that the principal should be excused from answering in damages for the conduct of his servant, in the management of steam power on a rail road, as it would be to exempt the principal in respect to his own acts.

JOHNSON, J. The jury have found, by their verdict, that the death of Bissell was occasioned by the gross negligence

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of the agents of the defendants at the time of the collision. Being negligence of that character which resulted in the death of several human beings, it was criminal in its nature, and would have subjected the guilty agent to indictment and punishment under the statute. (2 R. S. 662, § 19.)

Neither the contract nor the ticket can be construed to refer to injuries from such a cause. It would be against the settled rules of construction to hold that injuries from criminal causes were intended by the parties. In *Welles v. The New York Central Rail Road Co.*, (26 Barb. 641,) it was conceded by the learned judge who delivered the opinion, that negligence so culpable as to imply fraud or bad faith would not be one of the risks assumed by the passenger, when, by accepting a free ticket or pass, he had expressly agreed to assume all risk of accidents, whether occasioned by negligence of the company's agents or otherwise. The injury here arising from a cause not within the risk, constitutes a good cause of action against the defendants. Whatever may be said in the books about degrees of negligence, they are clearly recognized by our statute, which makes culpable negligence by which a human being is killed, manslaughter in the fourth degree.

The remark of the judge in his charge to the jury, that it seemed to him a case of gross negligence, is no ground for an exception. The whole question was submitted to them. I do not find any error in the charge, or in the refusal to charge, and am of the opinion that the order refusing a new trial should be affirmed.

T. R. STRONG, J. I concur in the result of the foregoing opinion; but I think there is no difference in principle between this case and the case of *Welles v. The same defendants*, (26 Barb. 641.) In the latter case, it was admitted by the parties, that the plaintiff took passage at Lyons for Albany on a passenger train of cars of the defendants; that while seated in the forward passenger car, a collision occurred between that train of cars and the cars of a freight or cattle train standing

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on the same track of the defendants' road, whereby the baggage car of the passenger train was driven back into the car where the plaintiff was seated, and he was injured; and that such collision and injury were occasioned by carelessness and negligence of the defendants and their servants in charge of the respective trains. This was all the evidence in the case in explanation of, or in regard to, the collision. If the negligence thus proved was not a misdemeanor, for which an indictment would lie at common law, it was certainly as culpable as the negligence in the present case. Fortunately, the consequences were not so serious; but that makes no difference as to the grade of the negligence.

There is no force in the idea suggested, that as the parties have not designated the degree of the negligence, the court must regard it as simple ordinary negligence; for, without reference to the admission, in terms, of negligence, the facts admitted, unexplained, show gross or culpable negligence. The defendants with one train of cars ran into another train of the defendants on the same track; and upon these naked facts the law would not presume there was a justification, excuse or palliating circumstance, not offered to be proved, but adjudges there was neither.

The principle of liability in this, was, in my opinion, equally applicable in the other case.

E. DARWIN SMITH, J. In the conclusion to which my brother JOHNSON has come in this case, and in his reasons, in the main, I concur, but not in the view of my brother STRONG, that there is no distinction in principle between this case and that of *Welles v. The same defendants*, in 26 Barb. 641.

It seems to me that the verdict in this case can be sustained, and both decisions stand together. It was not intended to deny, in the case of *Welles*, that there were not different degrees or shades of negligence, but to express a doubt whether those degrees could be defined with sufficient distinctness for any practical purpose. But, however this may be, there is

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obviously such a degree of negligence as in common and legal language is known and designated as *gross* or *culpable*. The legislature has called this degree of negligence, in sections 6, 13 and 19 of article 1, title 2, chapter 1, part 4 of the revised statute, (3 *R. S.* 54th ed.)—in defining manslaughter—*culpable negligence*. The 19th section is as follows: “Every other killing of a human being by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not in said act declared murder or manslaughter in some other degree, shall be deemed manslaughter in the fourth degree.” This degree of negligence, whether called *culpable* or *gross*, means the same thing—that want of care and regard to his duty which every man of common sense applies to himself and his own affairs or property, (*Edwards on Bailment*, 44; *Story on Bailment*, § 17,) or such neglect as is equivalent to *fraud*, or is evidence of fraud. (*Jones on Bailm.* 10, 46, 119.) From the consequences resulting from this degree of negligence, whether death ensue or not, no person can claim exemption by contract. (26 *Barb.* 645.) If the defendant was a natural person, and the negligence was his, as the jury have found this to be a case of gross negligence, nothing further need be said in support of their verdict. But the defendant is a corporation aggregate, and could not be guilty of manslaughter or any other crime. As it has no *soul*, it can incur no moral guilt. It acts, necessarily, through officers and other agents. This fact, obviously, should not confer upon it any degree of irresponsibility in the affairs of business which would not apply to natural persons. Its agents must necessarily be liable criminally, like all other natural persons, and civilly for willful wrongs. The case of *Welles* was put upon the *distinction* between the negligence of the *principal* and the negligence of his *agents* and *servants*.

The defendants are common carriers of persons and property. A common carrier is one who undertakes for *hire* or *reward* to transport the persons or goods of such as choose to

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employ him, from place to place. (*Story on Bailm.* § 495 *Edwards on Bailm.* 425, 584.) As the obligation which the carrier assumes rests upon the basis of contract, express or implied, it would seem that, in point of principle, he must possess the same right with other persons to make his own contracts. But this right is clearly subject to some restriction. The carrier is deemed to exercise a quasi public employment; and for this reason, and in this respect, it has long been held that public policy requires some limitation upon this absolute right. The defendants are a rail road corporation, and exercise a public franchise, and as such are doubtless subject to legislative control and restriction in regard to the manner of doing their business, and in regard to the character and extent of their undertakings and obligations with individuals. But as common carriers, independently of particular legislation, they stand upon the same common law footing with natural persons, and the measure of their responsibility is precisely the same. Civilly, the defendants, as common carriers of persons for hire or reward, are liable for all injuries resulting from the negligence, carelessness or unskillfulness of their servants and agents, (16 *N. Y. R.* 362; *Story*, § 400,) and from all such acts of negligence for which, if they were natural persons, they would be liable criminally. They clearly cannot exempt themselves from civil responsibility by contract. Precisely the same obligation rests upon them, and the same restriction upon their right to limit their responsibility by contract exists, as would apply to a natural person in their place.

When rail road or other corporations assume the duty and employment of common carriers, as in this case, and act entirely by officers and agents, as they necessarily must, I conceive that they cannot contract for exemption from responsibility for whatever pertains to the *proprietorship* of the rail road, nor for the acts of that class of superior agents who act for and in the place of the corporation, as officers, directors or other managing agents, and who, as such, within the trust

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confided to them, control and direct the operations of the corporation, and employ its inferior servants and agents. If a single natural person, for instance, owned the defendants' rail road and its property, and operated the same for his own benefit, he would be bound to employ and provide skillful, careful, sober and proper persons as engineers, conductors, brakemen, switch tenders, and in all other positions, and would be bound to see to it that the tracks of his rail road, its bridges, turn-outs, and all other portions of his road, and the locomotives and cars in use thereon, and all the appurtenances of the road, were in a safe and proper condition. He could not stipulate for immunity from injuries resulting from negligence in respect to any such particulars, no more than he could for bad faith or fraud. All contracts exempting him, or seeking to exempt him, from responsibility for his personal negligence or fraud, would be repugnant to public policy, and absolutely void. (*Alexander v. Greene*, 3 Hill, 20. *Story on Bailm.* 21.) And the same rule, I think, should be applied to corporations. Public policy forbids the making by them of any contract that shall exempt them from responsibility, that would not be allowed to a natural person exercising the same precise employment. A private person, operating this rail road as his own, might stipulate, by express contract, I think, that a person who should ride free over his road should take the risk of the negligence of his subordinate agents and servants in running his trains; provided that he himself was free from all negligence in their employment, direction or otherwise. No one has a right to require a common carrier to transport him or his property without charge and at his own risk. And I can conceive no legal objection to a contract fairly and distinctly made, between a common carrier and a passenger who pays no fare, that the latter shall take his own risk in respect to the negligence of subordinate agents or servants in their appropriate sphere. And this is all we meant to decide in the case of *Welles*. No man who pays his fare

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will be likely to make such a contract, or voluntarily to relinquish any safeguard for his personal security.

In this case the plaintiff's husband made and signed with his own hand an express contract, in which it is stipulated that the persons riding free on the defendants' road, to take charge of stock, do so at their own risk of personal injury, from whatever cause. And he also received from the defendants' agents, at the same time, a ticket with an indorsement thereon, stating that the person receiving the same assumed all the risk of accidents, and expressly agreed that the company should not be liable under any circumstances, whether of negligence or otherwise, for any injury to the person, &c. In such a case I conceive that there is no liability on the part of the defendants, except such as would exist between two private persons when one undertook to carry the other gratuitously from one place to another, for the personal accommodation or pleasure of the latter. The defendants would not be subject to the responsibilities of common carriers, but would be liable simply as *bailees*, as in the case of a naked depositary without reward, or a mandatary, who are only responsible for *gross or culpable neglect*. (16 N. Y. R. 447. 11 Wend. 25. 17 Mass. Rep. 479. 7 Cowen, 278.)

In this view of the defendants' responsibility, in either aspect of the case, I find no difficulty in sustaining the verdict. The jury have found that the case was one of gross negligence, and this gross negligence was the negligence of the principal, in the employment of the very careless, incompetent and stupid, if not drunken, switchman, whose heedlessness caused the collision of the trains which produced the death of the plaintiff's husband. Such, doubtless, was or may have been the opinion of the jury and the grounds of their verdict. On these grounds I think it entirely correct and proper.

In the case of *Welles v. The same defendants*, (*supra*), there was no such proof, and no evidence showing how the collision happened; nor any evidence that would warrant a

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jury in finding that any particular person, agent or servant, whose negligence caused the injury, was unfit for his place, or that any negligence had been committed by the defendants in their scheme or direction for the running of the trains, or in the employment of any of their agents or servants. It was stipulated in the case, by the attorneys, that the injuries were occasioned by the carelessness and negligence of the servants and agents of the defendants in charge of the two trains at the time of the collision. The express agreement of Welles, in that case, extended to, and was obviously designed to cover and embrace, the risks which would attend, and the casualties which might result from, the negligence of just this class of subordinate servants and agents, and where there was no fault or negligence on the part of the defendants, as *proprietors of the rail road*, in providing, to the utmost extent of care and diligence on their part, to prevent such casualty.

Upon this discrimination between the acts of the principal and the agent, I think that the case of *Welles* was rightly decided; although some expressions in the opinion may require qualification. And that the verdict in this case can be sustained without involving any inconsistency between the two cases. I concur, therefore, in the decision that a new trial be denied.

Order refusing a new trial affirmed.

[MONROE GENERAL TERM, September 5, 1859. *T. R. Strong, Smith and Johnson*, Justices.]

FROST and others *vs.* McCARGAR.

The settled rule in this state now is, that where the veracity of a witness is attacked and he is sought to be impeached, only by proof of contradictory statements made by him on other occasions, in respect to the same matter, or by proof of particular facts, stated by such witness, against himself, on his examination, evidence of general good character, or of good character for truth and veracity, in support of the witness, is inadmissible.

Where a complaint alleges that the defendant, while acting as the agent of the plaintiffs, has, with intent to embezzle the plaintiffs' property, fraudulently secreted, made way with, and converted the same to his own use, and in another count it alleges that the defendant, being in possession of the plaintiffs' property as their agent, has converted the same to his own use, it is proper to charge the jury that if they should find that the defendant, under the false pretense of having been robbed, has converted such property to his own use, they may find a verdict for the plaintiff, under either count.

APPEAL from a judgment entered at a special term, on the verdict of a jury. The plaintiffs, in the first count of their complaint, alleged that on the first day of October, 1856, they were copartners in business at the city of Rochester, under the firm name of "A. Frost & Co." That on the 13th day of that month the plaintiffs duly appointed the defendant their agent and servant to deliver certain personal property then owned by the plaintiffs, consisting of trees, shrubbery and nursery property, to purchasers or contractors therefor in the state of Wisconsin, and to receive the money to be paid therefor, which appointment was accepted by him. That in pursuance of such appointment, the plaintiffs placed in the hands and possession of the defendant, as their agent, a large amount of nursery property, to be delivered as aforesaid, to wit, of the value of \$2600 and upwards; that the defendant proceeded to the state of Wisconsin with the said property, and that he made delivery thereof to contractors and purchasers, and received therefor the sum of \$2648.43, over and above expenses. That the defendant, being so possessed of the said money belonging to the plaintiffs, and being their agent and servant as aforesaid, with intent to embezzle the same, did fraudulently and feloniously secrete and make way with

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and convert to his use the money aforesaid, to the amount of \$2648.43, and wholly neglected and refused, and still does neglect and refuse, to produce and pay over to the plaintiffs the money aforesaid, or any part thereof. In a second count, the plaintiffs alleged that on the 17th day of November, 1856, the defendant was possessed of \$2648.43, the property of the plaintiffs, of which the defendant was in possession as their agent and servant; and that the defendant converted the said money to his own use. Wherefore the plaintiffs demanded judgment against the defendant for the said sum of \$2648.43, with interest from the 17th day of November, 1856, beside costs.

The defendant put in an answer, denying most of the allegations in the complaint; but admitting that he had delivered a part of the trees and shrubbery purchased by him of the plaintiffs, and collected a sum more than the amount claimed by the plaintiffs; and alleging that the whole of said moneys were stolen from his possession by some person or persons unknown, and without his knowledge, privity or procurement, and without any fault or neglect on his part.

On the trial the plaintiffs proved the appointment of the defendant as their agent, and the delivery to him of trees and shrubbery to the amount sued for, for the purpose of enabling him to fill the orders which he had received, as their agent; and that the defendant had sold and disposed of such trees and shrubbery and received the pay therefor. That he had failed to remit any of the proceeds to the plaintiffs, and when called on to do so, he had stated to the plaintiffs that he had been robbed of the sum of \$5800 which he had collected upon the sale of such trees, &c.

Much circumstantial evidence was offered by the plaintiffs, and given to the jury, having a tendency to show that the defendant had not been robbed, as he claimed and alleged, and that the story and account given by him of the alleged loss of money was wholly untrue; and that the said money had not been lost, but was in the possession of the defendant, and had been

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concealed and expended by him for his own use. The plaintiffs having rested their case, the defendant moved for a nonsuit, on the ground that he was not acting as an agent, in a fiduciary capacity, for the plaintiffs, under the agreement given in evidence. The court denied the motion, and the defendant excepted. The defendant also gave evidence tending to show that on the 17th day of November, 1856, he had been robbed of the said \$5800 at Madison, by some person unknown, without fault on his part, and that the account that he gave of the loss of said money was true. The defendant was called as a witness on his own behalf, and gave evidence material to the issue. On his cross-examination by the counsel for the plaintiffs, he gave evidence without objection, having a tendency to prove that while the defendant lived in California, a few years before, he had been engaged in gambling and betting on horse races; that he had been engaged in fights, and had lost a finger in a fight; and that while he was in Kansas, during the year or two before the trial, and after the 17th November, 1856, he had been engaged in defrauding the United States government by means of false and fraudulent proceedings, in taking up pre-emption claims by means of erections on them, 10 inches by 12 inches, instead of 10 feet by 12 feet, as the law required; that he had connived at such frauds, and had made money by their means. The defendant then called a witness, and offered to prove that the defendant's general moral character, and character for truth and veracity, were good, and rested his claim on two grounds; 1st. That in an action of this kind the defendant might prove his good moral character as part of his case; and 2d. That the defendant's general good moral character had been impeached by the plaintiffs on his cross-examination. The counsel for the plaintiffs objected to the evidence, and the court sustained the objection and rejected the evidence; and the defendant's counsel excepted. The counsel for the defendant requested the judge to charge the jury, that the defendant was not acting as an agent for the plaintiffs in a fiduciary capacity. The court declined so to

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charge, and the counsel for the defendant excepted. The court charged, that under the contract in evidence, and the proofs in the case, the defendant was acting as an agent for the plaintiffs in a fiduciary capacity; to which ruling and charge the defendant excepted. The court also charged that the plaintiffs might recover under either count or cause of action in the complaint, if they, the jury, found that the defendant, under pretense to the plaintiffs of having been robbed, unlawfully converted the money of the plaintiffs to his own use; to which ruling and charge the defendant excepted. The court further charged the jury, that to sustain the action the plaintiffs need not show, nor need the jury find, that the defendant embezzled the money of the plaintiffs, but it was only necessary for the jury to find that under pretense to the plaintiffs of having been robbed, he had converted the money of the plaintiffs to his own use; and that if the jury should find that the defendant, under such pretense, wrongfully converted the money of the plaintiffs to his own use, they might find for the plaintiffs under either count of the complaint; to which ruling and charge the defendant excepted. The jury found a verdict for the plaintiffs for \$3066.69, being the principal sum of \$2648.43 and interest thereon.

John N. Pomeroy, for the appellant.

Benedict & Martindale, for the respondents.

By the Court, JOHNSON, J. We think the settled rule in this state now is, that where the veracity of a witness is attacked, and he is sought to be impeached only by proof of contradictory statements made by him on other occasions, in respect to the same matter, or by proof of particular facts stated by such witness against himself on his examination, evidence of general good character, or of good character for truth and veracity in support of the witness, is incompetent. (*The People v. Hulse*, 3 Hill, 309. *Starks v. The People*,

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5 Denio, 106. *The People v. Gay*, 1 Parker's Cr. Rep. 310. Same case affirmed, 3 Selden 378. *Smith v. Stickney*, 17 Barb. 489.)

It was said, in the court of appeals, in the case of *The People v. Gay*, by Jewett, J., and also by Parker, J., in the supreme court, that the decision in the case of *The People v. Rector*, (19 Wend. 569,) and also that in *Carter v. The People*, (2 Hill, 317,) had been in effect overruled by the decision in *The People v. Hulse*.

It is clear enough, we think, that the latter decision is entirely irreconcilable upon principle with the former, and must be held to have changed the rule. And besides, how does proof of good character tend to reconcile the contradictory statements of the witness, or to relieve him from the damaging effect of the facts stated by him in regard to himself. The fact that the public had never before found out the true character of the witness, could legitimately afford no support to his credibility under such circumstances. The rule, as now established, rests upon sound reason, as well as authority.

The court was also right in charging the jury that if they should find that the defendant, under the false pretense of having been robbed, had converted the plaintiffs' money to his own use, they might find a verdict in the plaintiffs' favor, under either count in the complaint.

The judgment should therefore be affirmed.

[MONROE GENERAL TERM, September 5, 1859. T. R. Strong, Smith and Johnson, Justices.]

THE PEOPLE, *ex rel.* John W. Mitchell, *vs.* THE SHERIFF OF NEW YORK.

A combination, between a party and his attorney, to prevent the court from compelling the production of important papers required as evidence, on a trial, by transferring such papers from one to the other, is, *it seems*, entirely distinct from a case where the confidential communications of a client are sought to be disclosed.

In no instance should such communications be disclosed, by an attorney and counsel, and the courts should carefully guard against any attempt to compel a counsel thus to betray the confidence of his client. But when the party and his counsel thus combine together to defeat the proper administration of justice, and seek to use this privilege as a cloak for that purpose, the act is not entitled to the protection of the court. *Per* INGRAHAM, J.

Where the papers sought for are required in evidence, and are needed for the purpose of identification, the counsel is, to that extent, bound to produce them; even if he can be protected from disclosing their contents.

The party himself may be required to produce the papers, where they are in court and in the possession of his agent, the attorney.

On a *habeas corpus* in a case of commitment for a contempt, only two questions can be examined; *first*, as to the jurisdiction of the court or officer making the commitment; and *secondly*, as to the form of the commitment. If the jurisdiction is undoubted, and the commitment is sufficient in form, and contains the cause of the alleged contempt plainly charged therein, the prisoner must be remanded, and the writ discharged. The court has no power to inquire into the justice or propriety of the commitment.

Nor can the supreme court review, upon *certiorari*, the judgment of a court ordering a commitment for a contempt.

ON *habeas corpus*, directed to the sheriff of the county of New York.

By the Court, INGRAHAM, J. The relator applied, by petition, for a *habeas corpus*, and on the return of the writ was brought before this court by the sheriff. The sheriff returns that he holds the prisoner by virtue of and according to the tenor, manner and command of a certain commitment for an alleged contempt, a copy of which was thereto annexed.

By such commitment it appears that in an action pending in the court of common pleas, for the recovery of a lot of land in the city of New York, one Betz had been examined as a witness on the trial thereof; that he was defending the action

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as the landlord of the defendant ; that he was asked whether he had in his possession any deeds &c. relating to the land ; that he answered he had received from the grantors a lease and other papers, which, a few days before, he delivered to his counsel, the relator, who was also attorney for the defendant, and that he was unable to produce the papers, because they were in the possession of the said relator, who was then in court, and acting in the cause as attorney for the defendant. It also appeared that the relator was then called as a witness and was asked whether he had such papers in his possession, and delivered to him by Betz, and replied that he could not state, without examining a bundle of papers then in his possession in court ; and on being directed by the court to look at such papers, for the purpose of answering the question, refused to do so. And while the case was under consideration, the relator gave the bundle of papers to his client, with instructions to take them from the court. It is also stated that on a subsequent day the said relator was again examined in the same action, the trial having been adjourned to that time, and he then admitted that he had the papers in court, and he was asked and directed by the court to look at the papers so far as to identify them and to produce the papers, which he refused to do, giving as the reason that it would be a breach of privilege as the attorney for the defendant. It is also stated that such questions were pertinent to the issue, and for such refusal the relator was adjudged by the court of common pleas to be guilty of contempt. Upon these grounds the warrant of commitment was issued.

If we were to dispose of this question upon the merits, there could be but little difficulty in sustaining the order made by that court in granting the commitment. If a party and his counsel can, by transferring from the one to the other important papers required as evidence in a cause and thereby prevent the court from compelling the production of such papers on a trial, it will not be difficult in this way to defeat the administration of justice. Such a combination between a party

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and his attorney might well, under the circumstances, be considered as entirely distinct from a case where the confidential communications of a client are sought to be disclosed. In no instance should such communications be disclosed by an attorney and counsel, and the courts should carefully guard against any attempt to compel a counsel thus to betray the confidence of his client. But when the party and his counsel thus combine together to defeat the proper administration of justice, and seek to use this privilege as a cloak for that purpose, the act is not entitled to the protection of the court. The counsel could at once have relieved himself of the responsibility by placing in his client's hands the papers called for by the court, instead of retaining the possession, and thereby defying the power of the court.

The papers sought for were required in evidence, and it appears were needed for the purpose of identification. Whether the party calling for them had secondary evidence of the contents, does not appear in the warrant. For such a purpose, it was necessary to show their existence, and that they could not be produced. To this extent, even if the counsel could be protected from disclosing their contents, he was bound to produce them. This point has been expressly adjudged in a similar case of *Phelps et al. v. Prew*, (24 *Law and Eq. R.* 96,) although in that case the additional fact appeared that the counsel stated, his client had directed him not to produce the deed. It was there held that the privilege of the client was not violated by requiring the attorney to produce the deed for identification. WIGHTMAN, J. says, "Compelling the production of the deed for the purpose of identification, was no violation of the privilege; it being necessary to show that the attorney had the deed, which he was required to produce." ERLE, J. said, the judge therefore was justified in compelling the production of the deed, in order that the indorsement might be looked at. And CROMPTON, J. says, "There was no violation of privilege in directing the deed to be shown for the purpose of identification." And in *Dwyer v. Collins*, (21 *Law*

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J. Rep., N. S. 225,) it was held that an attorney of a party to a suit may be asked, and is bound to answer, whether a document, which he has received from his client, is in his possession, or elsewhere in the court. PARKE, B. says, "The privilege does not extend to matters of fact, which the attorney knows by any other means than confidential communication with his client; though if he had not been employed as attorney, he would not have known them. Thus he may prove the fact that a particular document is then in his possession and in court; for this is a fact not professionally disclosed to him. All these cases draw a distinction between answering as to the possession of the paper and producing it for identification, and as to disclosing the contents." (*See also Broad v. Pitt, Mood. & M.* 233, and *Ecke v. Nokes, Id.* 303.)

It is not necessary to inquire whether the contents of these papers could have been disclosed by the counsel. That the party himself should have been required to produce them, while they were in court, and in the possession of his agent, the attorney, would have been proper, and would have placed the responsibility on the one who should have borne the consequences of refusal.

Whether the ruling of the court was correct or not, we are of the opinion that the statute requires us to remand the prisoner in this case. By the 40th section of the statute as to writs of habeas corpus, (2 *R. S.* 567,) it is made the duty of the court forthwith to remand the party, if it shall appear that he is detained in custody * * * for any contempt specially and plainly charged in the commitment, by some court having authority to commit for the contempt so charged. And by the 42d section, the court is deprived of any power to inquire into the justice or propriety of any commitment for a contempt, made by any court, officer or body, according to law, and charged in such commitment.

That the common pleas had jurisdiction of the action and of the parties, is not denied. That the contempt was of a court having authority to commit for the same, cannot be

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doubted. It is one for which any court, even not a court of record, can punish, viz. a refusal of a witness to answer a question which he is directed by the court to answer on the trial. The commitment is regular and sufficient in form, and contains the cause of the alleged contempt plainly charged therein.

I have had occasion heretofore to examine how far a court or officer can inquire into a case of a commitment for contempt, in the case of *Devlin*. In that case, which was before a justice of this court in a special proceeding, and not in court, it was held that only two questions could be examined; *first*, as to jurisdiction; and *secondly*, as to the form of the commitment. That rule is applicable to this case.

It is apparent that the court had authority to examine the witness; and in the language of Judge Bronson, in *The People v. Cassels*, (5 Hill, 165,) "if the justice had authority to inquire into the offense, the commitment could not be impeached upon *habeas corpus* for any supposed error in requiring the witness to answer an improper question. The contempt was specially charged, and it was the duty of the judge to remand the prisoner." And again he says, "It is evident that the legislature did not intend to provide for a retrial by *habeas corpus* in such a case." And the only inquiry allowed in that case, as in the case of *Devlin*, was as to the jurisdiction of the magistrate. As the jurisdiction in the present case is undoubted, and the commitment is sufficient in form, and contains all that the statute requires, we are of the opinion that the prisoner must be remanded and the writ discharged.

An application was made to the court yesterday for the allowance of the *certiorari*, in the same matter. Although we do not feel at liberty to refuse the allowance of the writ, if the relator desires, it under the provisions of the revised statutes which makes it always the duty of the court or judge to allow the writ, still we suppose the counsel will see from

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our views in the above opinion, that for the reasons above stated we could not review the judgment of the common pleas in this matter, and that the issuing of that writ would be unavailing to the party. The writ also should be directed to the officer having the custody of the prisoner, and not to the judge who made the order, (*see 52d section*;) and the form of the writ, as given in the statute, (§ 30,) is only to return the day and cause of imprisonment, and not the proceedings.

If the writ of *certiorari* is desired, it will be allowed in the form directed by the statute.

[NEW YORK GENERAL TERM, May 2, 1859. *Davies, Ingraham and Sutherland*, Justices.]

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In the matter of the estate of HENRY PARISH, deceased.

The sole object of appointing a special collector, by the surrogate, is the preservation of the property, and the collection of the debts. Such collector has no authority to pay debts, or make any disposition of the funds, except to pay his own expenses in collecting and preserving the property of the estate.

And an order of the surrogate, made on admitting a will to probate, by which he directs that the costs and expenses of the parties, to be certified and allowed by the surrogate, be paid out of the estate, is to be construed as contemplating a payment to be made by the executor, in the due course of administration, and is no authority to the special collector to make any payments.

The contestants, either for or against a will, have no claim to be paid out of the estate, until a final decision is made, so as to take the property out of the hands of the special collector; and an order directing him to pay costs and expenses to the litigants is erroneous, and should be reversed.

APPEAL, by Daniel and James Parish, residuary legatees and devisees under the will of Henry Parish, deceased, from an order of the surrogate of New York, made on the 31st of December, 1857, by which he ordered that all payments made by the special collector, on the order of the sur-

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rogate, be ratified and confirmed; and further, that there be paid to various parties other sums not before directed to be paid.

James Eschwege and C. O'Connor, for the appellants.

T. B. Cutting, W. M. Evarts and Henry Day, for the respondents Delafield and S. M. Parish.

J. T. & D. Sherwood, for the respondents Sherman and A. Parish.

By the Court, INGRAHAM, J. During the pendency of the litigation before the surrogate, as to the validity of the will and codicils of the deceased, the surrogate appointed a special collector. After he made the decision admitting the will and one codicil to probate, and rejecting the other codicils, the parties aggrieved appealed to this court. The surrogate, in deciding the case, directed that the costs and expenses of the parties, to be certified and allowed by the surrogate, be paid out of the estate. This order was made on the 17th December, 1857, and was not appealed from. On the 31st December, 1857, the surrogate made another order, confirming as proper charges all payments made by the special collector, and directing various payments to be made by the special collector on account of the costs of the various parties litigating as to the will.

It is objected by the respondents, on this appeal, that the order of the 17th December not having been appealed from, the parties were concluded by that portion which directs the payment of the costs; and the order of the 31st December was merely a taxation of the costs. The effect of the order of the 17th December was not to that extent. That order was made when the surrogate decided to admit the will to probate; and the direction to allow the parties costs out of the estate, contemplated a payment to be made by the executor in the due course

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of administration. The appeal from the surrogate's decision stayed any action on the part of the executor, (3 *R. S.* 150,) and continued the special collector in the charge of the estate. This order was no authority to the special collector to make any payments, and the order of the 31st December first adjusted any allowances, and ordered the same to be paid by the collector. The sole object of appointing the collector, is the preservation of the goods and property and the collection of the debts. (3 *R. S.* 161, § 39, 5th ed.) Such collector has no authority to pay debts or make any disposition of the funds, except to pay his own expenses. The statute authorizes him to collect the goods, chattels, debts, &c. of the deceased, and to secure the same at such expense as shall be allowed by the surrogate, and for such purposes to maintain suits; to sell such of the goods of the deceased as shall be deemed necessary for the preservation of the estate after appraisement; and on the probate of the will, to deliver to the executor all the estate of the deceased. It appears to me, therefore, that the special collector has no authority to make any payments, except such as are necessary for the collection and preservation of the property of the estate; and if he has no authority to pay, the order of the surrogate directing the payment was erroneous.

It is not necessary, now, to inquire whether the appellants may not hereafter, if these claims should be allowed by the executor, when he finally obtains letters testamentary, object to the accounts and the allowances on the executor's final accounting.

Whether the surrogate has any power to allow to a party who does not succeed in such a litigation his costs and expenses, is a question of much moment. By the statute, (3 *R. S.* 143, § 33,) where a will of personal estate is contested, and afterwards admitted to probate, the statute provides that the party contesting shall pay the surrogate's fees and expenses; and *if the probate of a will should be revoked*, the party who fails may be required to pay the costs personally, or out of

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the estate. There is no provision for such allowances, in cases of wills of real estate. There is a manifest difference between the authority of the surrogate in admitting a will to probate, and the cases referred to by the counsel, where courts of equity have ordered the costs of construing a will, or adjudicating upon trusts, to be paid out of the estate. Such a power is conferred upon a court of equity, to be exercised according to the discretion of the court; but the surrogate's court obtains authority to award costs from the statute, (3 *R. S.* 367, § 25,) which says: "In all cases of contest before a surrogate's court, such court may award costs to the party in the judgment of the court entitled thereto, to be paid by the other party personally, or out of the estate. (*See Shultz v. Pulver*, 3 *Paige*, 185.) But in *Burtis v. Dodge*, (1 *Barb. Ch. R.* 91,) it was held he could not make arbitrary allowances. It is not necessary, however, to discuss this branch of the case, at present. I think it is apparent that the contestants, either for or against the will, have no claim to be paid out of the estate, until a final decision is made, so as to take the property out of the hands of the special collector; and an order directing him to pay costs and expenses to the litigants is erroneous, and should be reversed.

As the counsel for the appellants stated that it was not desired to interfere with the payments heretofore made by the collector, under the order of the surrogate, he should be protected as to such payments. So much of the order as confirmed the payment made by the special collector, under the order appealed from, is not to be affected by this appeal; and the order to be made reversing the order of the surrogate is not to affect such payments.

So much of the order of the surrogate as directs the payment of any moneys by the collector is reversed.

[NEW YORK GENERAL TERM, May 2, 1859. *Davies, Ingraham and Sutherland*, Justices.]

NOYES *vs.* BURTON and others.

A lien under the mechanics' lien law in the city of New York ceases, after one year from the time of filing, unless the party filing it commences proceedings in the court of common pleas, within that time, to bring it to a close. And the fact of the person asserting the lien being made a party to an action to foreclose a mortgage upon the property, will not relieve him from the consequences of his neglect to bring the lien to a close.

During the year, the supreme court can recognize the lien as existing, and can continue the lien on the property, or keep its proceeds in court, subject to the lien, if proper proceedings are taken to enforce it; and it may, perhaps, obtain jurisdiction so far over the subject matter as to order the lien to be discharged by payments, if it is brought to a close within the year, or if proceedings are still pending for that purpose. But it can give no judgment ordering the property to be sold to satisfy the lien, either before or after the year expires.

A lien under the mechanics' lien law cannot be asserted where the person alleged to be the owner of the premises did not hold the fee at the time the notice of lien was filed, he having previously conveyed the premises to another.

An innocent purchaser from a person obtaining his title and having his deed recorded previous to the filing of a notice of lien, is not bound to take notice of any lien filed after his grantor's deed was recorded.

APPEAL from an order made at a special term, upon the report of a referee. The facts are detailed in the opinion of the court.

By the Court, INGRAHAM, J. On a reference to ascertain who was entitled to the surplus on a sale of mortgaged premises. Bailey, one of the defendants, claimed the amount due him under the mechanics' lien law, for work done upon the premises sold. This work was done for Wm. L. Johnson, contractor with Warren Beman and Josiah H. Burton, and the notice of lien was filed on the 28th of September, 1857. Beman never held the title of the property. Burton, in whom the title was, conveyed the premises to Leeds by deed, May 16, 1857, which was recorded May 20, 1857, and Leeds conveyed the premises to Ogden, February 1, 1858, by deed recorded February 19, 1858.

On the hearing before the referee, Bailey offered to prove the facts necessary to sustain a lien against Burton and a con-

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tract with Beman, made by Burton for the sale of the premises, and that the conveyance to Leeds was intended to defraud the workmen out of their liens. No offer was made to show that Ogden was cognizant of these facts.

It appears to me there are several reasons why Bailey's lien cannot be enforced. 1. The lien has expired. By the statute the lien ceases after one year from the time of filing, unless the party filing it within that time commences proceedings in the court of common pleas, to bring it to a close. (*Sess. Laws of 1851, p. 954.*)

The fact of his being made a party to this action does not relieve him. The lien still ceases after a year, because he has not done what the statute declares to be necessary to continue the lien in force after that period. During the year this court could recognize the lien as existing, and could continue the property, or keep its proceeds in court subject to the lien, if proper proceedings were taken to enforce it; and might, perhaps, obtain jurisdiction so far over the subject matter as to order the lien to be discharged by payment, if it was brought to a close within the year, or if proceedings were still pending for that purpose. But they could give no judgment ordering the property to be sold to satisfy the lien either before or after the year expired, because that judgment can only be rendered by the common pleas, and the proceeding is not one known to this court or the common law.

2. Another reason why the defendant Bailey is not entitled to a share of the surplus is, that neither Beman nor Burton held the fee at the time of filing the notice of lien. Burton had some months previously sold the property to Leeds, whether fraudulently or not is immaterial; because Ogden had purchased from Leeds innocently, for value and without notice of the lien. He had no notice of the filing of the lien in September, because Leeds obtained the title previously; and whether he held it for Burton or not, Ogden not knowing that fact, was not bound to take notice of any lien filed after Burton's deed was recorded.

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3. Even if Ogden had knowledge of the fraud, the conveyance was good between the parties. The creditors had their remedy in an action for equitable relief, but if, instead of resorting to that remedy, they neglected their rights, and suffered their lien to expire, it is now too late to ask the court to enforce it.

I see no ground upon which Bailey is entitled to relief. The ruling of the referee was right, and the order made by him should be affirmed.

[NEW YORK GENERAL TERM, May 2, 1859. *Roosevelt, Ingraham and Pratt, Justices.*]

JONES vs. THE NEW YORK AND ERIE RAIL ROAD COMPANY.

In an action against a rail road company, for negligence in not conveying a quantity of dried apples to market, within a reasonable time, the plaintiff cannot recover as damages the difference between the price of dried apples at the time the property in question should have been delivered, and the price at the time when the property was in fact delivered.

The decision in *Wibert v. The New York and Erie Rail Road Company*, (19 Barb. 36,) reaffirmed; and the case of *Kent v. The Hudson River Rail Road Company*, (22 Barb. 278,) disapproved.

APPEAL from a judgment of the county court, affirming the judgment of a justice of the peace. The plaintiff delivered to the defendants, at Dunkirk, 3146 pounds of dried apples to be transported to the city of New York. He alleged in his complaint that they were to be delivered in New York in four days from 7th December, 1857, and at the price for transportation of 60 cents per 100 pounds. The apples were delivered to the defendants, at Dunkirk, on the 4th, 5th and 7th days of December. They were shipped in two cars which left Dunkirk on the 8th of December. The day the apples were to leave, the plaintiff inquired of a clerk or clerks in the office at Dunkirk, how long it would take to get the apples

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to New York, and was answered, three or four days. This was all the evidence tending to show any special contract as to the time of delivery in New York. One of the cars reached New York on the 12th of December, at which time the price of dried apples in the city was eight cents a pound; the other car arrived on the 16th, when the price of dried apples was seven and a half cents, at which price the plaintiff sold the apples. The plaintiff was permitted, though the defendants objected, to prove the decline in the price of apples between the 12th and 16th December, for the purpose of fixing the measure of damages. The plaintiff gave no evidence tending to show the time usually consumed in transporting freight to New York. The defendants proved that the clerks at Dunkirk had no authority to contract for the delivery of freight in any specified time, and that no such contract was made in this case. Also that freight trains ran through from Dunkirk to New York in from three to thirty days. That freight cars go from Dunkirk to Hornellsville, and freight trains are there made up differently, owing to freight coming there on the road from Buffalo; and that cars coupled together are sometimes separated. There was also a question in the case as to the price to be paid for transportation; the plaintiff claiming that he was to pay only 60 cents a hundred pounds. He paid in New York 80 cents. The question is not material on review. At the close of the evidence the plaintiff was permitted to amend his complaint by adding "that there was an implied contract to deliver freight by ordinary care in New York by the 12th, that apples had fallen in New York, and therefore the defendants were liable for the delay."

The justice allowed, as to the apples delivered in New York on the 16th of December, as an item of damages, the difference in the price of the apples on the 12th and 16th days of December. The judgment was affirmed by the county court, and the defendants appealed to this court.

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Warren & Morris, for the plaintiff.

O. W. Johnson, for the defendants.

By the Court, MARVIN, J. Unless it shall be held that there was a special contract in this case to deliver the apples in New York within four days, the case comes within the case of *Wibert v. The New York and Erie Rail Road Company*, (19 Barb. 36.) It cannot be claimed that any special agreement was made to deliver the apples in New York at any specified time. The plaintiff, as he says, went to Dunkirk on the 3d of December, to see what it would cost to take his apples to New York, and was told 60 cents a hundred; and he told the clerks he would bring the apples along and have them there by the 7th of December. A part of the apples were taken to Dunkirk on the 4th of December, a part on the 5th, and the remainder on the 7th, when the plaintiff took a receipt in the usual form. He asked how long it would take to get them to New York, and the answer was, as he says, three or four days. He then went on to New York. There was no contract to deliver apples in New York in four days. The plaintiff made the inquiry after the apples were delivered, and the clerk expressed the opinion that they would be in New York in three or four days.

This point in the case may be dismissed. The case was put, on the argument, mainly upon the *negligence* of the defendants, or an implied contract to deliver within a reasonable time. The justice proceeded upon the ground that if the defendants were negligent, or failed to deliver the apples in New York in a reasonable time, they were liable in damages, and the measure of damages was the difference in the price on the day when they should have been delivered, and the day they were delivered. The justice and the county court must have followed *Kent v. The Hudson River Rail Road Company*, (22 Barb. 278,) in which *Wibert v. The New York and Erie R. R. Co.* is examined and overruled. Generally we follow the more

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recent decisions, as better evidence of the law ; but constituted as the supreme court is, I suggest that magistrates and county courts should, generally, follow the decisions of the judges in their own districts, when there is a conflict of decisions, until the court of last resort shall settle the question.

In *Wibert v. The New York and Erie Rail Road Co.*, the precise question raised in this case was presented, and it was carefully examined and considered by the supreme court, at general term, in this district, and although it has been overruled in *Kent v. The Hudson River R. R. Co.*, we ought to adhere to our decision, unless we are satisfied that we were in error, until the law shall be settled by the court of appeals. I have carefully read the opinion of brother Smith in *Kent's case*, and it has failed to convince me that the court in this district erred in *Wibert's case*.

I might stop here, as I do not know that I can present my views with more clearness now, than they are expressed in the opinion so elaborately reviewed by brother Smith. It seems, however, that I was unsuccessful in my effort to show that certain cases, upon which he very much relies, had no legitimate application to the question we were considering ; also that some of my positions and arguments were misapprehended. In *Wibert's case* an elaborate brief had been prepared by the plaintiff's counsel, to sustain the ruling of the referee. Many of these cases, it was conceded, were not in point, unless the principles they established should, by analogy, be applied to the question discussed. In the opinion an attempt was made to present or bring into view all the well settled, general rules relating to damages for the breach of contract or failure to perform a duty imposed by law, which it was claimed or supposed could have any application to the question under consideration. Hence, after showing that the liability of a common carrier for a *tardy* delivery, did not rest upon the same principles as the liability for a total failure to deliver, and showing upon what principles the liability did rest, I proceeded to state the general, well settled, universally recognized rules, relating

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to damages, *resulting* from the injury complained of; adding that it is not difficult to understand them, but that the difficulty lies in their application to the thousand varying circumstances and combinations of facts, arising and calling for their application. It is agreed that the damages must always be the *natural and proximate consequence* of the act complained of.

Starting with these general rules, taken from elementary authors, and supported by adjudged cases, I endeavored to show that the decline in the price of the butter was not a *natural consequence* of the injury complained of, viz: the unreasonable delay in delivering the butter. I could see no connection then, nor can I now, between the two things. I then proceeded, hypothetically, to consider that part of the rule which requires that the damage should be a *proximate consequence* of the act complained of; and I endeavored to show that the damages or loss arising from the decline in the price of the butter, was not a *proximate consequence* of the delay in delivering the butter, but that such damages would be *too remote, too contingent, too speculative*. It was remarked that it was difficult to consider this part of the rule, until it could be seen that the fall in the market price of the butter *resulted* from the breach of duty by the defendant. I did, however, proceed to state some of the rules, and refer to some of the cases relating to *proximate damages*; and I extracted some of the language of Nelson, Ch. J., in *Masterton v. Mayor of Brooklyn*, (7 Hill, 67,) speaking of remote and contingent damages. I did not refer to the case itself as an authority one way or the other, upon the question involved in Wibert's case. Indeed, I did not suppose the case itself had any application to the case then under consideration; but brother Smith has made much use of the case to overthrow my positions and arguments; and although I thought I understood the ground upon which *Masterton v. Mayor of Brooklyn* was decided, my respect for brother Smith has caused me to re-examine it, and I shall in the proper place again refer to it.

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I will not now repeat my arguments or remarks upon the question as to the *proximity* of the damages—as to those gains and losses that are, in the language of Nelson, J., “too contingent and speculative in their nature, and too dependent upon the fluctuations of the markets and the chances of business, to enter into a safe or reasonable estimate of damages.” I will, however, avail myself of the present case as an illustration, and add it to cases supposed in the opinion in *Wibert's case*. Indeed, I then, in considering the case of contingencies, supposed what has actually happened in this case. A portion of the dried apples were put into one car, and another portion into another car. One of the cars arrived in New York in due time, and there is no complaint as to that. The plaintiff was in New York, and “inquired the price of apples all round the city; was there for the purpose of learning the market price.” When the first car arrived, the price of dried apples was eight cents a pound, and when the other car arrived they were only worth seven and a half cents, and at this price the plaintiff sold his apples. Why did the plaintiff wait from the 12th December, when the first car of apples reached him, until the 16th, when the other car came, without selling the apples that had reached the market? Why did he not sell those that came on the 12th at eight cents? How do we know but that he was waiting for a better price? The case does not tell us when he did sell. He may have waited, for aught we know, a month, and the price may have been fluctuating daily; and it may have been, at times before he sold, higher than eight cents. He *owned* the apples, and was not obliged to sell, though he may have been offered ten or more cents a pound. The rule against which I contend is arbitrary. It simply looks to the price of the article on the day when the carrier should have delivered it, and the price on the day when it was delivered; and if there has been a decline in the price, the carrier is to respond in damages precisely the amount of the difference, without any regard to the contingency as to the owner selling on the day of arrival, or any other contin-

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gencies. If there has been an advance in price during the delay, this is the good luck of the owner, that is, if we assume that he would have sold the property on arrival, in case it had come on the day it should have come, we must also assume that he does sell on the day it does arrive, and does not wait for a further advance, until the price declines lower than it had at any previous time been. Thus, innumerable contingencies may be supposed.

In *Wibert's case* a strong argument was made to induce the court to adopt, by analogy, the rule of damages for a breach of contract between vendor and vendee. The court refused to apply such rule, for the reasons stated in the opinion, and to which, without repeating them, I refer.

Before proceeding to the cases upon which Justice Smith relies, and which were remarked upon by me in the opinion in *Wibert's case*, I will refer to a remark of his, showing, as I think, that he has fallen into a serious error as to the character of the rule of damages applicable to the case, though he supposes me to have committed the error. After making several extracts from my opinion, he says: "The theory of damages, as suggested and involved in these extracts from the opinion of the learned judge, is, that the damages properly recoverable in an action, must be the direct and immediate consequence of the injury or breach of duty complained of. The rule of damages thus enunciated belongs to the large class of injuries, direct or immediate, for which, under the old nomenclature, the action of trespass was the appropriate remedy, and practically ignores the large class of consequent injuries, for which trespass on the case or assumpsit was the proper form and manner of the action."

I certainly did not so understand the matter while considering *Wibert's case*. I knew that the action in that case was founded, either upon contract implied by law, and arising out of the duty of a common carrier, or for *negligence* in the performance of that duty; and I stated that the rule would, in the case under consideration, be the same, whether the

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action should be regarded as upon contract, or for negligence; and I certainly supposed that the authorities referred to, touching damages, applied to such a case. If, in truth, the authorities and the rules of law to which I had referred, and my argument founded upon them, practically ignored the large class of consequential injuries, for which, formerly, trespass on the case or assumpsit was the proper remedy, then I did commit a very serious blunder. I had referred to 2 *Greenl. Ev.* §§ 253, 254, 256, relating to damages generally; to *Sedg. on Dam. ch. 3*, entitled "Of remote and consequential damages;" *Armstrong v. Percy*, (5 *Wend.* 538, 9,) an action of assumpsit; 6 *Hill*, 648, an action of assumpsit; *Sedg. on Dam.* 58, 112, 2d ed. The reader can examine the references in the opinion in *Wibert's case*, and the remarks founded upon them, and I think he will not come to the conclusion that the real question was not understood, or that the proper sources of the law were not consulted. The case may have been erroneously decided, but of this I am not yet satisfied.

As to *Masterton v. Mayor of Brooklyn*, (7 *Hill*, 67,) so often referred to by brother Smith, it was decided upon the simple principle that when one party to an executory contract puts an end to it, the other party is entitled to an equivalent in damages—the gains and profits he would have realized from a performance of the contract. The case comes directly within the rule requiring that the damages be the natural and proximate consequence of the act complained of. The plaintiffs had contracted to deliver stone at a stipulated price; after delivering a portion of them, the defendant refused further performance of the contract. The natural and proximate consequence of this breach of the contract, by the defendant, was the loss by the plaintiffs of all the profits and gains they would have made by performing the contract. This principle had long been settled, but I was not able to see its application to *Wibert's case*.

It was my intention to remark further upon *Davis v. Garrett*, (6 *Bing.* 716,) and *Bracket v. McNair*, (14 *John.* 170,)

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and *O'Conner v. Foster*, (11 *Watts*, 418,) which Justice Smith regards as authorities against the conclusion to which we came in *Wibert's case*; but I do not think I should be able to add any thing very material to what I then said. I endeavored to show that they rested upon their peculiar facts, and upon principles entirely consistent with the views taken in the opinion in *Wibert's case*.

Smith v. Griffith, (3 *Hill*, 333,) is referred to by Justice Smith. It was the case of the mulberry trees, that were *injured* while in the custody of the carrier, by reason of the long neglect to transport and deliver them. The decision was put upon the ground of the negligent loss or injury of the goods entrusted to the carrier to transport. I do not understand the learned judge in *Kent's case* to claim that this case is in point, except by way of analogy. He also refers to the rule of damages for the breach of executory contracts between vendor and vendee. After making an extract from Judge Nelson's opinion in *Smith v. Griffith*, concluding: "Assuming that there is no defect in the quality, the fair test of its value, and consequently of the loss to the owner, is the price at the time in the market." Judge Nelson is here speaking of cases where the goods have been *injured* by the *negligence* of the carrier, and in answer to the offer to prove that some years after the injury, it was demonstrated the mulberry trees were of little or no value. Justice Smith remarks that the case, in its facts and the principles upon which it is decided, is quite in point in opposition to the opinion in *Wibert's case*. This depends upon the question whether the rule which gives damages against a carrier for *injury done to the property*, by his neglect, shall be applied to a case of neglect to deliver in due time, though the goods are in fact delivered in good order. In one case it is *certain* that the owner has sustained damage resulting from the negligence of the carrier. His *injured* goods cannot be as valuable as they would have been, if not injured. In the other case the goods have not been injured. They cannot be sold for as much in market as they could

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have been a few days before, or they may be sold for more, or if not for as much, then, by waiting a few days, a better price may be obtained than at any previous time. In one case the damage and loss are certain. There are no contingencies. In the other case numerous contingencies present themselves.

Justice Smith says, the contingency in such cases must be at the risk of the party who is guilty of a breach of contract or a breach of duty. This is the *very point* to be established. Establish it as a rule that in all cases of a breach of contract, or breach of duty, the bailee is to respond in damages to the bailor for any loss he may have sustained, however contingent, and though not contemplated by either party at the time of the bailment, and its consequences will be very sweeping. I borrow or hire my neighbor's horse for a short journey. I over stay the time I was to be absent, a day, and on that day the owner had an opportunity to sell the horse for \$500, and would have sold him had he been at home. The opportunity for making the sale is lost, and the owner, a month after, makes the sale at \$300, the best price he can get. Am I liable to respond to him in damages to the amount of \$200? See numerous cases referred to in *Sedg. on Dam. ch. 3*, entitled "Of remote and consequential damages."

Justice Smith refers to *Scovill v. Griffin*, (2 Kern. 509,) decided in the court of appeals, after the decision in *Wibert's case*; and he quotes from Justice Edwards' charge to the jury what, undoubtedly, sustained his position. This part of the charge did not come under review in the court of appeals. It stands there simply as the opinion of a respectable judge at the circuit. All that was decided in the court of appeals was, that the omission of a common carrier to transport and deliver property to the consignee within a reasonable time, does not necessarily render him liable for its value. The carrier is liable for the damages caused by such omission; but the owner cannot, on the sole ground of unreasonable delay in the conveyance and delivery of the property, refuse to receive it, and recover against the carrier as for its conversion. The

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question we are considering was not before the court of appeals. The case was decided at the June term of the court, in 1855. *Wibert v. N. Y. and Erie R. R. Co.* was decided in that court at the March term previous. The question was in that case, though it was not necessary to decide it, and it was expressly reserved. (*See close of Judge Denio's opinion.*) I was a member of the court when these cases were decided, and concurred in both decisions. I certainly did not understand them as affirming the proposition for which Justice Smith contends. The question was presented in *Conger v. Hudson River R. R. Co.*, (6 *Duer*, 375,) decided in February, 1857; but the question was not decided, as the case turned upon another question. Judge Woodruff, however, in his opinion, refers to *Wibert v. N. Y. and Erie R. R. Co.* with approbation, and expresses his own opinion in accordance with the opinion in *Wibert's case*. Judge Woodruff did not understand that the cases in the court of appeals affected the question, or that the cases upon which Justice Smith relies were applicable.

In conclusion, as I understand the case, the question had not been decided until *Wibert's case*; and in that it was simply decided that the referee erred in holding that the measure of damages against a common carrier, for a *delay* in delivering the goods, was the difference in the price of the goods in market on the day they should have been delivered and the day they were delivered, in case there had been a decline in price. It was not affirmed that in such a case no damages could be recovered; nor were any suggestions made as to what damages might be recovered. These questions were left for decision as they should arise. The bailor may, in such a case, undoubtedly recover an idemnity for any *legitimate* damages he has sustained—damages which are the natural and proximate consequence of the breach of the contract or duty—damages that naturally result from the breach, and which are not too remote, speculative or contingent. This may include interest upon the value of the property during

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the time the owner was deprived of it ; or if it should be property he could use, the value of the use of it. Many special circumstances may exist entitling him to damages, within the principles referred to. The common law has never attempted to compensate for all injuries sustained. It refuses to take into consideration damages remotely resulting from the act complained of. If an attempt were made to follow up, step by step, all the *remote consequences* of acts that may be complained of, and to give redress in damages, the result would be a failure. The rules would become so numerous, complex and uncertain, as to be impracticable. Lord Bacon says : " It were infinite for the law to judge the causes of causes, and their impulsion on one another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." (*Sedg. on Dam.* 57, 58, 2d ed.)

The judges composing the court in the seventh and eighth districts differ in opinion, and they will probably adhere to their respective decisions until the question shall be settled by the court of last resort.

The judgment of the county court and that of the justice must be reversed.

[NIAGARA GENERAL TERM, September 12, 1859. *Greene, Marvin and Davis*, Justices.]

VAN ELLEN vs. CARRIER.

Where a married woman purchases a farm, and takes a conveyance thereof, to herself, in fee, executing a mortgage thereon for the purchase money, and she, in the absence of her husband from the state, occupies the land, and cultivates it at her own expense, she is entitled to the crops ; and a purchaser thereof, from her, will acquire a good title thereto, as against the creditors of the husband.

The fact that upon a purchase of land, by a married woman, her husband joins her in giving a mortgage upon the land, to secure the payment of the purchase money, will not affect the wife's title to the land.

APPEAL from a judgment entered upon the decision and report of a referee. The action was brought to recover the value of hay and oats converted by the defendant. The referee found as facts: That in May, 1852, the farm upon which the hay and oats were raised, was by an arrangement between Epenetus H. Griffin and his wife Eunice, and Samuel M. Russell and one Calwell, conveyed by Russell to Eunice Griffin, and a mortgage upon the farm was executed by Mrs. Griffin and her husband to Calwell to secure the payment of the purchase money. That Mrs. Griffin had, previous to such conveyance, occupied the farm; the mortgage was foreclosed, and Calwell, in August, 1853, became the purchaser of the mortgaged premises, and in November of that year Calwell commenced an action against Griffin and wife, to recover possession of the premises; and he recovered judgment Sept. 28, 1854, and soon after possession. Mr. Griffin, a few days before the action of ejectment was commenced, went to Illinois, leaving his wife and three minor children on the farm, and did not return until March, 1855, a few days before the trial of this cause. During Griffin's absence the farm was carried on by Mrs. Griffin and a minor son, aged 18 or 19. The hay and oats were raised on the farm in the summer of 1854, under the direction of Mrs. Griffin, and harvested and put in the barn, she employing laborers for that purpose. The teams and tools used on the farm belonged to Mr. Griffin. In August Mrs. Griffin made an agreement to sell the hay and oats to the plaintiff, who gave his note therefor, and subsequently paid a portion of the note. In September the hay and oats were taken in execution upon judgments against Mr. Griffin, and they were sold to the defendant, who took them away. The referee decided that from May, 1852, to August, 1853, Mrs. Griffin was in possession of the farm under her own title, and continued in actual possession until put out by the writ of possession. That the title of the crops raised in the summer of 1854 was in her, and that the contract between her and the plaintiff was valid, and vested the title in him; and that the

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plaintiff was entitled to judgment. The defendant excepted, &c. and appealed.

L. B. Soule, for the plaintiff.

Champlin & Rathbun, for the defendant.

By the Court, MARVIN, J. After examining the statute of 1848 as amended in 1849, relating to the separate rights of married women, and the case referred to by counsel, and some others, I have come to the conclusion that the referee has committed no error of which the defendant can complain.

The act of 1849 declares, that "any married female may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts."

In the present case, Mrs. Griffin took, by grant, the farm from Russell. She was seised in fee. It is true she executed a mortgage, in which her husband joined, to secure the payment of the purchase money. I do not see that this can affect her title to the land. She had capacity to take by grant, independent of the statute. It may be that the conveyance to her of the title was a fraud upon the creditors of her husband, but the case does not disclose facts requiring the referee so to find. It appears simply that her husband was in possession of the farm, and had occupied it prior to the conveyance to her. It does not appear how he occupied it, nor that he had ever paid any thing on account of the land. Indeed, the mortgage was given for the purchase money. The statute secures to her "the rents, issues and profits." In the present case her husband did not put in or harvest the crops, unless it should be said as a question of law that his wife and son were at work

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for him, and that they could not cultivate the farm on her account. He was absent, out of the state. It is not the case where the husband works the farm himself, doing or paying for the labor. The statute gives her the power of disposing of the property. I do not see that any question of fraud was raised by the evidence. It does not appear that Griffin owed any debts when the land was conveyed to his wife. In short, I think the plaintiff acquired a good title to the hay and oats by his purchase from Mrs. Griffin, as against the defendant.

It is said that the mortgage was foreclosed, and that the title of the property was in Calwell, who purchased the premises in August, 1853, the year before the oats and hay were raised. It may well be that Calwell was entitled to the hay and oats, and it will be in time to decide that question when he or some one claiming under his title shall present the claim. But the defendant has no connection with Calwell. He is a naked wrongdoer.

In short, I think the judgment should be affirmed.

[NIAGARA GENERAL TERM, September 12, 1859. *Greene, Marvin and Davis, Justices.*]

MUNCH vs. THE NEW YORK CENTRAL RAIL ROAD
COMPANY.

Under the provision of the statute, requiring rail road companies to erect and *maintain* fences on the sides of their roads, if a fence is thrown down, or blown down, or becomes defective from any cause, it becomes the duty of the rail road company to restore it within a reasonable time.

And though a fence is thrown down, and an opening left therein, by a trespasser, yet if it is suffered to *remain* in that condition an unreasonable length of time, a jury has a right to find that this is negligence in the rail road company.

When a rail road company is in default, for not repairing a gap in a fence, and a horse passes through the gap, upon the rail road track, and is there killed, the mere negligence of the owner in permitting the horse to run at large, in the highway, or to trespass upon a neighbor's premises, will not constitute a defense to an action against the rail road company, to recover the value of the horse.

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APPEAL from a judgment of the Niagara county court, affirming the judgment of a justice of the peace.

A. P. Floyd, for the plaintiff.

Lansing & Backus, for the defendants.

By the Court, MARVIN, J. Action to recover damages for killing the plaintiff's colt on the defendants' rail road. As I understand the evidence in this case, it tended to prove that the plaintiff lived upon the road between Niagara City and Lewiston, and early in March, 1858, the colt was let out of the stable, about noon, to water. He passed out of the gate on to the highway. The plaintiff did not follow him. After this the colt was in a neighbor's field (how far from the plaintiff's does not appear) adjoining the rail road track. There was a gap down in the rail road fence, and the colt passed out of it on to the rail road track. The next we hear of the colt, he and another horse were on the track, on the highway crossing, and they wheeled and jumped the cattle guards west of the crossing. The train overtook and killed the colt. There was snow on the ground. The cattle guards were partly filled with snow and ice. They were ordinary cattle guards. The gap in the fence was opened by one Young, a week or two before the colt was killed, without any permission from the defendants or their agents. It did not appear that the agents of the defendants had any knowledge that the fence had been let down. The jury found a verdict for the plaintiff, and the county court affirmed it, and I think we must affirm the latter judgment.

By the general rail road act of 1850, (*Sess. L.* 233, § 44,) the defendants are required to erect and maintain fences on the side of their road; and it is declared that until such fences &c. shall be duly made, the corporation shall be liable for all damages which shall be done by their agents or engines to cattle, horses or other animals thereon. Construction was

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given to this provision of the statute in *Corwin v. New York and Erie Rail Road Co.*, (3 Kern. 42.) The simple negligence of the owner of a horse in permitting him to run at large in the highway, or to trespass upon his neighbor's premises, will not constitute a defense to the rail road company that is in default. The statute requires the erection and maintenance of a fence. This duty is imposed upon the rail road companies. In this case the fence was not *maintained*. It is true it was thrown down by a trespasser, but it was suffered to *remain* in that condition one or two weeks. This the jury had a right to find was negligence in the defendants. If the fence is thrown down or blown down, or becomes defective from any cause, it becomes the duty of the rail road company to restore it within a reasonable time. In this case the jury have found that the gap was not closed within a reasonable time. The evidence shows that the colt passed on to the rail road through the gap. It seems that after this he was on the track, on the highway crossing. As I understand it he was in the highway, at the place where the track of the rail road crosses it, so that he was on the highway and also on the rail road track. He then jumped the cattle guard, leaving the highway and running upon the rail road track.

I do not think these facts change the case. The colt came on to the rail road through the open gap. Had the fence been maintained and the colt had strayed along the highway and stopped on the track, and upon the approach of the train turned and jumped the guard, a different question would have been presented. It might then have depended upon the question whether the cattle guard at the road crossing was, in the language of the statute, "suitable and sufficient to prevent cattle and animals from getting on to the rail road." It seems that it was not sufficient in this case. At any rate, if the question should turn upon the sufficiency of the cattle guard, I think there was evidence tending to show that it was not "suitable and sufficient." The statute is explicit that until

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such fences and cattle guards shall be duly made, the corporation shall be liable.

I think the judgment must be affirmed.

[NIAGARA GENERAL TERM, September 12, 1859. *Greene, Marvin and Davis*, Justices.]

OCTAVIA BOYCE, by her next friend, *vs.* THE CITY OF ST. LOUIS and others.

In respect to real estate situated in this state, claimed by a foreign corporation, it is for the courts of this state to construe the charter of such corporation, and determine whether the corporation is authorized thereby to take or hold such real estate.

An adjudication upon the question of its corporate capacity, by a court of another state, can have no further effect or authority than the reasoning upon which it may have been founded gives it.

A foreign corporation, not authorized by its charter or by statute, to take and hold real estate, cannot take, by devise, lands lying within this state.

Nor can the charitable intention of the testator, in such a case, be carried into effect with the aid of the statute of 42d *Eliz.*

ACTION for partition. The facts are set forth in the opinion of the court.

R. M. Harrington, for the plaintiff.

Daniel Lord, for the city of St. Louis.

M. S. Bidwell, for the defendant James Clemmons, jun. and his infant children.

SUTHERLAND, J. This is an action for partition of certain real property in the city of New York, of which one Bryan Mullanphy, late of the city of St. Louis, in the state of Missouri, died seised, leaving him surviving, as his only heirs at

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law, five sisters. Since his death one of the sisters has died, leaving a husband and several children surviving her. The parties to this action, other than the city of St. Louis, are the four surviving sisters and their husbands, and the surviving children and husband of the deceased sister. The city of St. Louis is made a party defendant, as claiming one equal undivided third of the real property sought to be partitioned, under an alleged last will and testament of the said Bryan Mullanphy. The city of St. Louis, in her answer, sets up such last will and testament, and a devise and bequest to her by it, of one undivided third of the testator's property, real and personal. A copy of an instrument in writing, purporting to be such last will and testament, is produced on the hearing; and it is admitted by the parties, that the will of the said Bryan, referred to in the answer, was by him executed in such form of law, as to subscribing, publishing and attestation, as was sufficient to devise real estate in this state, and that he was in law competent to devise; and by stipulation between the parties, such copy was read in evidence in the place of the original. By the will the testator leaves to the city of St. Louis one equal undivided third of his property real, personal or mixed, "to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis, on their way *bona fide* to settle west." There is no testamentary division of the other two thirds of the testator's property. He died seised of various lots and parcels of land in Missouri, some of them lying within and some of them without the limits of the city of St. Louis. The testator, at the time of his death, was a resident of St. Louis, and domiciled there, and the will was executed and he died there. In an action or proceeding instituted in the "St. Louis land court" for the partition of the real estate in Missouri between the heirs at law, to which the city of St. Louis was made a party, the court adjudged, that the city of St. Louis was entitled to, and could take and hold as devisees under the will, the third of such real estate in Missouri.

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The plaintiff in this action insists that the city of St. Louis has not the legal capacity to take or hold the said bequests or devises to it made, or the legal capacity to receive or carry into effect the trusts therein created; and that it has not by its charter the power or capacity to take or hold the property so bequeathed or devised to it. The city of St. Louis insists, preliminarily, that these questions cannot be contested or properly determined in this partition suit; but if they can, then she insists upon her right to take and hold as devisee under the will; and she further insists that the adjudication of the Missouri court on the question of her capacity to take and hold as such devisee under the charter, should control this court.

I have no doubt that the city of St. Louis was properly made a party in this action, and that it can properly be determined in this action whether she has any right or interest in or to the real estate thereby sought to be partitioned. Her claim is antagonistic, but she is not in possession.

As to the adjudication of the Missouri court on the question of the capacity of the city of St. Louis to take as devisee under the will, and the effect or authority it should be permitted to have here, it is necessary to advert to the principle of the common law, that a title or right in or to real or immovable property can be acquired, enforced or lost, only according to the law of the place where such property is situated, the *lex rei sitæ*. This principle applies as well to the capacity of the claimant to take or hold the real estate, as to the sufficiency in form or effect of the instrument, title, or evidence of title, under which the claim is made or sought to be enforced. (*Story on Confl. of Laws*, §§ 428, 430, 474. *Nicholson v. Leavitt*, 4 Sandf. 276. *Hosford v. Nichols*, 1 Paige, 226. *Chapman v. Robertson*, 6 id. 627.)

If the law of *situs* excludes aliens from holding lands, then an alien cannot take, no matter what may be the law of his domicil. If the claimant claims as *devisee*, then the will must not only have been executed and attested according to

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the forms and solemnities prescribed by the law of the *situs*, but the claimant must, by the law of the *situs*, be capable of taking by *devise*, no matter what may be the law of the domicile of the testator or devisee, or where the will was executed. If the claimant is a foreign corporation claiming as devisee, then not only the capacity of such corporation to take and hold real estate as devisee, but its capacity by its charter, is to be determined by the law of the *situs*.

Of course it belongs to the courts of the state or country where the real estate is situated, to declare and apply the law on the question of the capacity or right of the claimant. This principle of local jurisdiction, and of the application of the local law to real estate, results from the independent sovereignty of states or countries, and from settled principles of international law. In England and in this country the principle may be said to be practically without an exception; and so far has the principle been carried in England that in a recent case, (*Birchcliffe v. Vardill*, 7 *Clark & Fin.* 895.) the opinion of the court of king's bench, that a son born of Scottish parents before marriage in Scotland, who was afterward legitimatized by the subsequent marriage of his parents there, could not as heir inherit lands in England, because by the law of England, affirmed by the statute of Merton, no one could be heir or inherit lands unless born within lawful wedlock, was after two arguments affirmed by the house of lords.

In the United States the sovereignty of the several states is qualified by the constitution of the United States, and in certain cases the supreme court of the United States has concurrent jurisdiction with the state courts, even as to real estate; but in exercising such jurisdiction, the supreme court of the United States follows and applies the state law, and adopts the well settled judicial interpretation by the state courts of the state law. Applying this principle to this case, it is clear that it is for the courts of this state to determine whether the city of St. Louis has, as devisee, any right or interest in or to the lands in New York, of which the testator

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died seised, as it was for the courts of Missouri to determine the same question as to the lands in Missouri of which the testator died seised, according to the local law in either case.

Without raising the question whether a foreign corporation, in the absence of any law of this state to the contrary, has the same right to take and hold land in this state that it has in the state where it was created, but conceding such right, it is clear, as to real estate in this state claimed by such foreign corporation, that it is for the court of this state to construe its charter, and determine whether it is authorized by its charter to take or hold such real estate, (*Nicholson v. Leavitt*, 4 *Sandf. S. C. Rep.* 276;) and that an adjudication upon the question of its corporate capacity by a court of another state, can and ought to have no further effect or authority than the reasoning upon which it may have been founded gives it.

In this case the proceedings and judgment of the Missouri court, in the action or proceeding instituted in Missouri for the partition of the real estate of which the testator died seised in that state, appear from a transcript thereof properly authenticated, but the grounds upon which the decision was made do not appear.

I am of the opinion that the city of St. Louis could not take, and has no right or interest in the real estate sought to be partitioned in this action, for two reasons:

First. Because by her charter she is not authorized to take or hold such real estate, either upon the trust or for the use and purpose mentioned in the will, or for any other use or purpose.

Second. Because by a law of this state in force when the testator died and his will took effect, and still in force, no devise to a corporation could be valid unless such corporation was expressly authorized by its charter or by statute to take by devise.

As to this second reason, it is sufficient to refer to the law, (3 *R. S.* 188, § 3, 5th ed.) and to say that the city of St.

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Louis is not expressly authorized by its charter to take by devise, and that it does not appear that there is any statute of this state, or of the state of Missouri, authorizing it to take by devise. I do not mean to intimate, if the city of St. Louis has been expressly authorized by her charter, or by a statute of Missouri, to take by devise, that she could take or hold the real estate in question as devisee in contravention of the law of this state.

As to the other reason or ground upon which I put my decision, it is only necessary to transcribe that portion of the charter giving the power to take and hold property. By the charter, the city of St. Louis "may purchase, receive and hold property, real and personal, within said city, and may sell, lease or dispose of the same for the benefit of the city, and may purchase, receive and hold property, real and personal, beyond the limits of the city, to be used for the burial of the dead of the city; also for the erection of water-works to supply the city with water, and also for the establishment of a hospital for the reception of persons afflicted with contagious and other diseases, also a poor-house, workhouse or house of correction; and may sell, lease or dispose of such property for the benefit of the city, and may do all other acts as natural persons," &c. It will be seen at a glance, that not only are the purposes for which she may purchase, receive and hold property beyond the city limits, particularly specified and limited; but also, that the property, if real estate and beyond the limits of the city, must be near enough to the city to admit of its being used or held for one or more of the specified purposes. It would appear that by the charter she is not authorized to take or hold real estate in New York for any purpose; certainly not for any or either of the purposes specified in the charter; nor do I think she is authorized by the charter to receive or hold property within or without the city, in trust for the charitable use and purpose mentioned in the will of the testator.

A corporation derived from prescription, and resting upon the common law for its powers and capacities, may have quite

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undefined powers as to taking and holding real estate, and in other respects; but I take it to be a well settled principle of law, that a corporation, created by a legislature, has no other powers than those expressly granted by the legislature, and such as are necessary to carry into effect those expressly granted. (*The People v. Utica Ins. Co.*, 15 *John.* 358. *The New York Firemen Ins. Co. v. Ely*, 2 *Cowen*, 678.)

The specification in this charter of the uses or purposes for which the city of St. Louis can purchase, receive and hold property beyond the limits of the city, and the grant of an express power by it to purchase, receive and hold property beyond the limits of the city for these purposes, and within the city *for the benefit of the city*, imply a prohibition against taking or holding property without the city, except for one or more of the specified purposes, and even within the city, except for the benefit of the city. (*Cases last cited; and Jackson v. Hartwell*, 8 *John.* 422; *Trustees v. Peaslee*, 15 *N. H. R.* 317.)

My conclusion is, therefore, that the city of St. Louis could not and did not take as devisee under the will of Bryan Mullanphy any right, estate or interest in or to the real estate sought to be partitioned in this action.

But although the city of St. Louis had not capacity to take, before the case of *Owens v. The Missionary Society*, (14 *N. Y. Rep.* 380,) there might have been a question whether the charitable intention and purpose of the testator in making the devise, might not be carried into effect with the aid of the statute of 43d of Elizabeth. I assume, however, that it is settled by that case, if the city of St. Louis had not the capacity to take, that, as it respects the real estate, in this state, such charitable intent and purpose cannot be carried into effect. The result must be, that all the estate and interest which the testator had in the lands sought to be partitioned in this action, at the time of his death, on his death vested in his heirs at law, as if he had made no will.

I do not think that the provision of the revised statutes abolishing uses and trusts, except as authorized and modified

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therein, (1 *R. S.* 727, § 45,) affects the question of the validity of this devise, or would prevent the trust and charitable use and purpose, upon and for which the devise was made, from being carried into effect, even as to the real estate in this state.

I do not agree with what is said to that effect in *Ayres v. Methodist Episcopal Church*, (3 *Sandf.* 371;) *Yates v. Yates*, (9 *Barb.* 324;) *Beckman v. The People*, (27 *id.* 272 to 279;) and in one or two other cases. When the opinion in *Beckman v. The People* was delivered, I announced my dissent from that portion of the opinion, stating at the same time that I agreed in the conclusion to which Judge Davies had arrived, and briefly the grounds upon which I so agreed, which mainly were, that the testator in that case having bequeathed no particular sum for the dispensary, and having given no directions as to the amount to be used in its establishment, but leaving the amount wholly at the discretion of his executors, and the bequest of the surplus being a bequest of the surplus remaining after the establishment of the dispensary, and the executors having renounced the trust, I could not see how the court could appoint new trustees, and authorize them to exercise the discretion which the testator had given to his executors; that, for the court to do so, it appeared to me, would, in effect, be making a will for the testator. I make this statement here, certainly rather out of place, because the opinion of Judge Davies has been published in a pamphlet form, and reported as the opinion of the court; whereas, not only did I dissent, but I understood Judge Clerke also to dissent from that portion of the opinion above referred to.

I think the views of the late Assistant Vice Chancellor Sandford, expressed in *Kniskern v. Lutheran Churches*, (1 *Sandf. Ch.* 439,) and in *Shotwell v. Mott*, (2 *id.* 46,) on the question of the application of this provision of the revised statutes to charitable uses, are the right views.

I think, too, it is safely to be inferred from the cases of *Williams v. Williams*, (4 *Sel.* 525,) and *Tucker v. St. Clement's Church*, (*Id.* 558,) that the court of appeals approved of the

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views of Vice Chancellor Sandford, expressed in the two cases before mentioned ; and that the case of *Tucker v. St. Clement's Church*, which was a case of real estate, on a close examination, must be conceded to be a decision on the very question.

[NEW YORK SPECIAL TERM, October 21, 1859. *Sutherland*, Justice.]

THE BEEKMAN FIRE INSURANCE COMPANY *vs.* THE FIRST
METHODIST EPISCOPAL CHURCH IN THE CITY OF NEW
YORK, and others.

Where there is a surplus arising from the sale of mortgaged premises, after paying the mortgage debt, such surplus may, in the absence of any contesting creditors, be applied to the payment of another debt, owing by the mortgagors to the assignee of the mortgage ; the validity and amount of such debt being previously ascertained upon a reference for that purpose.

An insurance company, incorporated under the general act for the incorporation of insurance companies, being by that act allowed to invest on bond and mortgage, and having taken an assignment of a bond and mortgage, is authorized to purchase a claim against the mortgagors, and to have the same paid out of the surplus moneys arising from the sale of the mortgaged premises ; the purchase and assignment of such claim being considered as an investment on bond and mortgage.

MOTION to confirm report of a referee as to the disposition of surplus moneys arising from a sale of mortgaged premises.

E. L. Fancher, for the plaintiff.

P. Y. Cutler, for the defendants.

SUTHERLAND, J. The assignment of the bond and mortgage to the plaintiff was on its face an absolute assignment, without reservation, condition or trust. Under such assignment, and as the absolute, unconditional owner and holder of the mortgage, the plaintiff commenced this action of foreclo-

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sure; by the decree in which, the whole amount remaining due and unpaid on the mortgage, was to be paid to the plaintiff out of the proceeds of the sale of the mortgaged premises; the defendants, The First Methodist Episcopal Church, making no defense and putting in no answer. The proceeds of the sale of the mortgaged premises were more than sufficient to pay the mortgage and the costs of the action. After decree and sale, the defendant, the church, applies to the court for affirmative relief; setting up that the assignment to the plaintiff was not in fact or in equity absolute, but that the mortgage was assigned to the plaintiff as security for moneys paid and advanced, and to be paid and advanced by the plaintiff, to and for the said church; and that the whole amount which had been so paid and advanced by the plaintiff was much less than the amount remaining unpaid on the mortgage, for which the plaintiff has got the decree. This being admitted by the plaintiff, and the parties conceding that the plaintiff had so paid and advanced at different times and in various sums to the amount of \$8603.66, prior to May 28th, 1857, and the further sum of \$1236.66 on the 11th of May, 1858, these amounts, with interest, were ordered by the court to be paid to the plaintiff out of the moneys arising from the sale; and the plaintiff claiming the right to retain and to be paid out of such moneys the further sum of \$3500, with interest, as a debt justly due and owing from the church to the plaintiff, as assignee of Benjamin W. Benson and Wright Gillies, which right and debt were disputed by the church; the court ordered a reference to ascertain, as between the plaintiff and the church, to whom the residue of such moneys belonged and ought to be paid. After paying the plaintiff the sum so conceded to have been advanced, with interest, the residue of the money directed to be paid to the plaintiff by the decree was about \$3800. The referee reports that the sum of \$3500 belongs to the plaintiff, with interest from the 19th of January, 1858, and that the plaintiff is entitled to be paid that amount out

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of the residue of moneys remaining in the referee's hands. To this report and conclusion of the referee the church excepts.

If the \$3500, with interest, is a debt justly due and owing from the church to the plaintiff, I am of the opinion that the referee was right in his conclusion, and that his report should be confirmed.

He who asks for equity must do equity ; and there being no contesting creditors, surely if the church owes the plaintiff the \$3500 with interest, it would be equitable for them to pay it. What can be more just and equitable than to pay a debt ? And why should the court order the \$3500 to be paid over to the church, if the church ought immediately to pay it back again ? The question then is, is the \$3500, with interest, a debt justly due and owing from the church to the plaintiff ? On the part of the church it is insisted that it is not ;

1st. Because it was not at and prior to the time of the alleged assignment to the plaintiff absolutely owing and payable by the church to any person or persons.

2d. If absolutely payable and owing by the church, and thus a debt, that it was not owned and held by Benson and Gillies, the assignors, at the time of their alleged assignment of it to the plaintiff, and therefore did not pass to the plaintiff under the assignment.

3d. If a debt, absolutely payable and owing to Benson and Gillies, that the plaintiff was not authorized by their charter to purchase the debt, and could not accept the assignment, and cannot enforce the claim.

I think at the time of the assignment to the plaintiff the \$3500 was absolutely owing and payable by the church to Benson and Gillies individually, and that the right of action was in them alone as individuals and not in the "board of trustees of said church of the up-town party of said church." By the agreement of the 19th of January, 1858, between the church, as the corporation of the first part, and Benson and Gillies, "on behalf and representing the board of trustees of said church of the up-town party of said church," of the second

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part, the church as the corporation agreed to pay "to the party of the second part the sum of \$3500 for the expenses of the said up-town board, said payment to be made to said Benson." By a distinct and separate article of said agreement, it was agreed, that "for the information of the down-town board said up-town board shall render a true and just account of the property in their hands, and which has come to their hands since the separation, and also of all sums paid by them for property or on account of said church in John street;" and by another distinct and separate article of said agreement it was agreed, that the party of the second part should transfer and deliver to the party of the first part "all the property, goods, chattels and real estate, which they have at any time acquired, by reason of their connection with said church, and while acting, or professing to act, for said church," &c.

By recitals contained in said agreement, it appears that a dispute had theretofore existed in the First Methodist Episcopal Church of the City of New York, which had been productive of serious and protracted litigation, and that several suits were then pending between parties known as the down-town and the up-town parties, or by persons claiming to represent said parties; and that the agreement was entered into with a view to settle such suits and difficulties, and put a final end to all controversy. Now, whether the \$3500 payable by this agreement by the church to "the party of the second part," and the claim for which was assigned by Benson and Gillies to the plaintiff, was absolutely owing and payable by the church at the time of the assignment to the plaintiff, depends upon the construction of this agreement.

The counsel for the church contends that the agreement to pay the \$3500 and the agreement to render the account and to transfer and deliver the property are dependent upon each other; and that the \$3500 was not payable, and no action could be brought to recover the same, until the property was transferred and delivered, and the account rendered. I think the proofs taken by the referee show that the property was

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transferred and delivered by Benson and Gillies, or the up-town party, substantially in pursuance of the agreement prior to the assignment to the plaintiff; but it appears that the account never has been rendered; and upon the point whether Benson and Gillies, or the up-town party, had ever offered to render it; or the church, or the trustees of the church, had ever demanded it, the testimony is very contradictory.

I am of the opinion, however, that the agreements to pay the \$3500 and to render the account are independent, and not dependent the one upon the other. I am inclined to think, also, that even the transfer and delivery of the property was not a condition precedent to the right to the \$3500. By the agreement the \$3500 was to be paid "for the expenses of the up-town board," not for the property or the delivery of the property, or for the account or the rendering the account, and the account was to be rendered "for the information of the down-town board," and not for the \$3500.

I think the \$3500 was payable absolutely forthwith, or at least on demand; and even if a transfer and delivery of the property, or an offer to do so, was necessary before there was a right to make the demand, that the proofs establish that the property was transferred and delivered in pursuance of the agreement.

The \$3500 then was owing and payable absolutely at the time of the assignment. To whom? Who had a right to assign the claim to the plaintiff? Benson and Gillies, individually, or the up-town party, or the board of trustees of the up-town party, of which Benson and Gillies were two? I think Benson and Gillies were the legal owners and holders of the claim, and had a right, individually, to assign to the plaintiffs.

The agreement of the 19th of January must be considered as entered into between the church as a corporation and them individually. The church, represented by Richard Keeping, president of the board of trustees, and Barton Wood, one of the trustees, and who had been appointed a committee for the purpose by a resolution of the board of trustees, entered into

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the agreement as the church or the corporation. Benson and Gillies, by entering into the agreement for, or representing the up-town party, or the board of trustees of the up-town party, acknowledged the down-town party, or the board of trustees of the down-town party, to be the church corporation, or to represent the church corporation. Both of the antagonistic divisions could not be, or represent the church or corporation, each to the exclusion of the other. It follows that the statement of the representative character or capacity in which Benson and Gillies entered into the agreement, must be considered as mere words of description of them as individuals, and as the contracting parties of the second part, and not as showing that they contracted as the agents of the up-town party, or of the board of trustees of the up-town party, who not being incorporated as a party, or as the board of trustees of a party, were not capable of either suing or being sued or contracting. The debt then was owing and payable to Benson and Gillies, and was assignable not only in equity but at law.

The only remaining question is, Could the plaintiffs purchase this claim, and take an assignment of it? They are incorporated under the general act for the incorporation of insurance companies. By the act they are allowed to invest on bond and mortgage. I am of the opinion that, under the circumstances of the case, the plaintiffs having an absolute assignment of the whole mortgage, the purchase of the claim by them must be considered as an investment on bond and mortgage. They bought the claim and took the assignment, supposing that the payment of it was secured by the mortgage assigned to them by the church. With reference to the parol trust under which the mortgage was assigned, I think their payment of the claim to Benson and Gillies, and taking an assignment of it, ought to be considered as a further advance made to the church on the security of the mortgage. It is true the plaintiffs could not make the church their debtor by simply paying the debt to Benson and Gillies, without the consent or knowledge of the church; but the plaintiffs bought the claim and

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took an assignment of it, and the assignment made the church the debtor of the plaintiffs.

My conclusion is, that the report of the referee must be confirmed.

The question of costs is reserved until the entry of the order.

[NEW YORK SPECIAL TERM, September 18, 1859. *Sutherland*, Justice.]

JOHN B. UNDERHILL, ex'r &c., vs. ELIJAH CRAWFORD and
MINOTT MITCHELL.

An order of revivor, standing in full force, at the trial, is conclusive to show that the action has been properly revived in the name of the person therein mentioned as plaintiff; and that a recovery can be had in his name.

On a joint loan of money to two, the law, in the absence of any fact or circumstance, except the mere loan, will imply a joint promise to repay it; but if the lender agrees to take, and does take, the express promise of one of the two for the repayment, there is no room or occasion for the law's raising a joint implied assumpsit.

Where a lender, upon making a loan of \$500, accepted, as security for the repayment thereof, two promissory notes—one being for \$225, and signed by C. as maker, and by M. as "surety," and the other being for \$275, and signed by C. alone—and the money was paid to C. by the lender; *Held*, that the legal presumption arising from these facts was, that the \$500 was loaned to C., and not to him and M. jointly; and that the lender agreed to look to C. alone for payment. That this presumption was not conclusive, however, but might be rebutted.

Held also, that in an action, by the lender, against C. and M. jointly, it was erroneous for the judge, under these circumstances, to submit the question of the liability of M. for the amount of the \$275 note to the jury.

That the subsequent use, or participation in the use, of the money by M., was immaterial as regarded the question of his liability to repay it, if he was not originally liable as borrower.

And that if the debt was the debt of C. alone, and M. was not originally liable, any subsequent parol promise by M. to pay the \$275 note was void by the statute of frauds.

MOTION for a new trial. The action was brought to recover the amount of four promissory notes made by the defendant Crawford, three of which were also signed by the

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defendant Mitchell. The fourth was not signed by Mitchell, and he denied his liability to pay the same. The notes were payable to Peter Underhill, and the action was brought by him. The action subsequently abated by his death, and was, by an order of the court, revived in the name of the plaintiff as his executor. The substance of the pleadings, and the facts appearing, and the questions raised, on the trial, are sufficiently set forth in the opinion of the court. The jury found a verdict in favor of the plaintiff against both defendants for \$1807, being the amount of the four notes, with interest. The defendant Mitchell made a case, upon which he moved to set aside the verdict, and for a new trial.

P. Y. Cutler, for the plaintiff.

J. M. Van Cott and *William Silliman*, for the defendant Minott Mitchell.

SUTHERLAND, J. As to three of the notes on which this action was brought, amounting at the time of the trial to \$1424.75, there was no answer or defense by either of the defendants, and the plaintiff was entitled to a verdict for the amount of the three notes; and the judge before whom the cause was tried was right in denying the motion for a nonsuit, provided a recovery could be had in the name of John B. Underhill, as executor, &c., in whose name, as executor, &c., the action had been revived on the death of Peter Underhill, the original plaintiff. I think the order of revivor was at the trial conclusive upon the point, whether the action had been properly revived in the name of John B. Underhill, as executor, and whether a recovery could be had in his name. If the executor had sold and transferred the notes before the order of revivor, so that at the time the order was made, neither he, as executor, nor the estate of Peter Underhill had any interest in the continuance of the action, and for that reason the action should not have been revived in his name, then the

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defendants should have opposed the making of the order; or should have moved to vacate it on that ground; but the order standing in full force was conclusive upon the judge at the trial, that the action was properly revived and continued in the name of the executor.

The plaintiff was therefore entitled to a verdict for the amount of the three notes not contested by the answer, and the judge could not dismiss the action or grant the nonsuit.

As to the fourth note mentioned in the complaint, the question was, whether the defendant Mitchell was jointly liable with the defendant Crawford for the amount of that note, as so much money loaned and advanced to Mitchell and Crawford. Mitchell was not, and could not be made, liable on the note, for the note was made by Crawford alone, and was not signed by Mitchell.

The complaint, after setting out two sealed notes made by Crawford and Mitchell, and claiming to recover the amount thereof, states that the plaintiff, on the 3d day of July, 1841, loaned and advanced to the defendants \$500, which they agreed to pay to the plaintiff on demand; that they agreed to give the plaintiff therefor their joint and several notes, payable on demand; and that thereupon, "and for the consideration of the \$500 loaned and advanced as aforesaid," Crawford made two promissory notes, payable on demand, one for \$275, and the other for \$225, setting them out; that thereupon, and at the time the notes were drawn, Mitchell signed his name to the \$225 note, as follows: "Minott Mitchell, surety," but neglected and omitted to sign the \$275 note; that the \$500 so loaned and advanced was paid to Mitchell, with the express understanding that he should be held responsible; that the interest upon the \$500 included in the two notes had been paid by the defendants yearly, and every year, up to May 1, 1850, and the defendants, or one of them, had indorsed the payment of interest on each note when it was paid.

Mitchell, in his answer, denies that the \$500 was loaned to Crawford and him, and he denies that the \$500 was paid to

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him; and he denies, sufficiently and in form, I think, to put in issue so far as material, all the other allegations of the complaint relating to the joint loan of the \$500, or the joint liability of the defendants therefor or thereupon; except that he does not deny that he signed the \$225 note as surety, as alleged in the complaint; nor does he deny that he has paid interest on the \$225 and \$275 notes, but avers that whenever he has paid interest on either of the notes, he paid it for Crawford, and at his request, taking Crawford's notes shortly afterwards for the same.

The question, then, under the pleadings, was as to the joint liability of the defendants for the amount of the \$275 note upon a joint loan. It may be that the plaintiff was entitled to a verdict against Crawford for the amount of the \$275 note, either on the note or for so much money loaned to Crawford; but Mitchell could not be liable, unless the loan of the \$500 was a joint loan to him and Crawford. And conceding that the loan was to Crawford and Mitchell, and not to Crawford alone, Mitchell was not liable for the amount of the \$275 note, if Peter Underhill, who loaned the money, at the time he loaned it, intended to take, and did take, the individual note of Crawford for the \$275, intending and agreeing to look to Crawford's note and Crawford's individual responsibility for repayment of the money.

On a joint loan of money to two, the law, in the absence of any fact or circumstance, except the mere loan, would imply a joint promise to repay it; but if the lender agrees to take, and does take, the express promise of one of the two for the repayment, there is no room or occasion for the law's raising a joint implied assumpsit.

But as the answer of Mitchell in this case, instead of admitting a joint original loan, and averring that the lender agreed to take the individual note of Crawford, and look to him alone for payment, denies the joint loan, and does not specifically set up any such agreement, I am inclined to think that, under the pleadings, the question of Mitchell's liability

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for the amount of the \$275 note must depend upon the question whether the loan was originally joint or not.

Now, as the complaint alleges that the \$500 was loaned at one time and as one loan, the acceptance by the lender of the \$225 note signed by Mitchell *as surety*, without objection, was *prima facie* evidence, irrespective of other allegations in the complaint, not only that the \$225, but that the whole \$500 was loaned to Crawford, and not to him and Mitchell.

The same remark will apply to the acceptance of the \$275 note, signed by Crawford only. The evidence on the trial was, and it appears to have been a conceded fact, that the \$500 was paid to Crawford, and not to Mitchell, as alleged in the complaint, and that Mitchell was not present when the money was paid to Crawford. Nor do I find the least evidence of the allegations in the complaint, that the defendants promised to give their notes for the \$500, and that Mitchell omitted and neglected to sign the \$275 note; or that Mitchell was ever asked, or promised, to sign the \$275 note.

Crawford, the co-defendant of Mitchell, swore, in general words, "that the \$500 was a loan to us jointly by Peter Underhill," without stating that Peter Underhill so understood it, or any fact or circumstance to show that Peter Underhill so understood it. For aught that appears, Underhill was only swearing to *his* legal conclusion, and what he thought.

The only evidence on the part of the plaintiff, in addition to this, to show even that the loan was a joint loan to both defendants, was the oral testimony of Crawford and certain documentary evidence to show that the \$500 was paid by Crawford to Mitchell, to be used by him to discharge their joint liabilities and for their joint use and benefit, and was in fact so used; and the testimony of the plaintiff's attorney, Dusenberry, who testified that after the four notes on which the action is brought were placed in his hands for collection he had several conversations with Mitchell, in which Mitchell promised to pay the notes and offered to pay the interest; but

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on his cross-examination he stated that nothing was said about the note not signed by Mitchell, as distinguished from the other notes; that he did not call Mitchell's attention to it.

To contradict Crawford and to explain the fact of some of the indorsements on the \$275 note being in Mitchell's handwriting, and to show, from business transactions and relations between him and Mitchell, that even the subsequent use of the \$500 for their joint benefit, as testified to by Crawford, would have been consistent with the presumption arising from the notes, that the original loan was to Crawford and on his responsibility alone, certain evidence, oral and documentary, was offered on the part of Mitchell, a part of which was received and a part rejected. Without noticing particularly the exceptions taken on the part of the defendant to the rejection of this evidence, I think the learned judge who tried the cause erred in submitting the question of the liability of the defendant Mitchell for the amount of the \$275 note to the jury. I do not think that the evidence which was given and received on the trial, under the pleadings, authorized him to submit that question to the jury. The legal presumption from the acceptance by the lender of the \$275 and \$225 notes, was that the \$500 was loaned to Crawford, and that the lender agreed to look to him exclusively for the payment of \$275 of the \$500 so loaned. This presumption was not conclusive, but might be rebutted by proof. That Mitchell subsequently participated in the use of the money borrowed, would seem rather to give an occasion for an application of the legal presumption, than to disprove it. The subsequent use or application of the money was immaterial, if Mitchell was not originally liable as borrower. If the debt was the debt of Crawford alone, and Mitchell was not originally liable, then any subsequent parol promise by Mitchell to pay the \$275 note was void by the statute of frauds.

If the testimony was admissible to show an original liability, the promises proved by Dusenberry, under the circumstances, had little if any weight.

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The testimony of Crawford, that the \$500 was loaned and advanced to him and Mitchell, should, I think, under the pleadings and the other facts and circumstances of the case, have been looked upon as a mere statement of his legal conclusion.

Upon the whole, although I think the charge of the judge would have been well enough, had there been sufficient evidence to authorize him to submit the question of Mitchell's original liability for the amount of the \$275 note to the jury, yet I think he erred in submitting that question to the jury at all; and I think Mitchell has a right to avail himself of that error on this motion for a new trial. He excepted to the whole charge; he objected to all the evidence given and offered on the part of the plaintiff to show his liability, and he moved for a nonsuit, which could not be granted because the plaintiff had an undisputed right to recover against him on three of the notes.

I cannot avoid the conclusion, from a careful examination of this whole case, that the trial below was a second lame attempt (for it appears there had been one trial before) on the part of the plaintiff, to make the defendant Mitchell liable on the \$275 note which he never signed, by evading the statute of frauds and trying to get rid of the plain legal presumptions arising from the unexplained intentional acceptance by Peter Underhill of the \$225 note signed by Mitchell as surety, and of the individual \$275 note of Crawford, for the \$500 loaned.

My conclusion is that there should be a new trial, with the costs of this motion for a new trial to abide the event, unless the plaintiff elect, within ten days, to take judgment against the defendants for the amount of the three notes signed by Mitchell, with costs exclusive of costs on this motion for a new trial. If the plaintiff so elect, then the motion for a new trial is denied without costs to either party on such motion.

I think the plaintiff is also entitled to judgment against the defendant Crawford alone for the amount of the \$275 note signed by him alone.

[NEW YORK SPECIAL TERM, October 21, 1859. *Sutherland, Justice.*]

I N D E X.

A

ACTION.

1. Where money has been collected and placed in the hands of town officers, for the purpose of paying the interest upon bonds issued by the town, pursuant to the provisions of a statute, and the statute makes it the duty of such officers to apply the money in satisfaction of such interest, a bondholder may maintain an action against such officers, to recover the interest due upon his bonds. *Murdock v. Aikin*, 59
2. Where money has been collected, or received upon a judgment valid at the time and binding between the parties, and that judgment is subsequently reversed, the money may be recovered back, although the payment may not have been coerced by actual duress. *Lott v. Swezey*, 87
3. The remedies by order of restitution, or by *scire facias*, in such a case, are merely cumulative, and do not bar an action. *ib*
4. The act of exploding fire crackers, in the public streets of a city, is wrongful and unlawful; and if any injury to the persons of individuals, or to property animate or inanimate, results therefrom, the wrongdoer is liable to compensate the sufferer. *Conklin v. Thompson*, 218

See HUSBAND AND WIFE, 7, 10.
 INJUNCTION, 3.
 RELIGIOUS SOCIETIES, 1, 2.
 TENANTS IN COMMON.

ADVERSE POSSESSION.

1. Where a person's entry and claim of title are not founded upon any written instrument, or any judgment or decree, he will be deemed to have possessed and occupied only so much of the lands as have been protected by a substantial inclosure, or have been usually cultivated or improved. *Becker v. Van Valkenburgh*, 319
2. Where there is no claim of title founded upon a written instrument, or a judgment or decree, there must be a *pedis possessio*—an actual occupancy, or a substantial inclosure of the lands, definite, notorious and certain, to constitute an adverse possession. *ib*
3. But the inclosure need not be by an artificial fence, or other erection. Thus, where there was a fence on the south and west sides of the premises, and on the east and south-east sides was a ledge of rocks from 200 to 400 feet in height, but no other barrier; *Held* that such ledge of rocks completed the inclosure, as much so as if an artificial fence had been constructed along that line. *ib*
4. Under the revised statutes, as formerly, if an adverse possession commences in the lifetime of the ancestor, it will continue to run against the heir, notwithstanding any existing disability on the part of the latter, when the right accrues to him or her. *ib*
5. In an action for trespass in cutting timber, the plaintiffs showed a paper title in them to the land on which the timber was cut. The defense

was adverse possession. It was proved that as early as the year 1823, the defendant V., under a license from his father, who claimed the premises, entered upon them, erected a house, and made a clearing thereon. A part of the land was then in the occupancy of B., the father of two of the plaintiffs. V.'s entry was under a claim of right, open and notorious, and in hostility to the grantors of the plaintiffs. He lived on the lot, claiming it as his own and cultivating a portion thereof, and cutting his firewood and timber therefrom. His possession and claim was continued during the lifetime of B., (who died in 1854,) and afterwards, until 1848 or 1849, the time of the alleged trespass. The plaintiffs never attempted to assert any claim to that portion of the premises on which the trespass was alleged to have occurred, until 1850 or 1851. *Held* that these facts tended to establish an *adverse possession* in V., and justified the finding of the referee in favor of the defendants *ib*

See DEDICATION TO THE PUBLIC.

AGREEMENT.

1. Where one contracts to serve another, for a specific time, he may leave his employer before the expiration of the time agreed upon, if sufficient cause exists to justify such leaving; and he will be permitted to recover for the time he actually served, and in some cases beyond that. *Gates v. Davenport*, 160
2. Where there is a provision in the contract that the employee may leave in case of a disagreement, the fact of a *bona fide* disagreement is all that is necessary to entitle either party to put an end to the contract. *ib*
3. Where one contracts with an infant to pay him for personal services, he is not at liberty, after the services have been rendered, and after the infant has become of age, to refuse to pay him, because he was, at the time of contracting, an infant without a guardian; when it appears there was no one entitled to receive his wages. *ib*

4. On the 19th of June, 1857, the plaintiffs bought of the defendants a quantity of sheep, for the sum of \$168. paying \$50 of the price down, and agreeing to pay \$50 on the 22d of that month, and to take the sheep away and pay the balance of the purchase money, within ten days from the day of sale. The plaintiffs did not pay the \$50 on the 22d of June, and did not call for the sheep, and offer to pay the balance of the price, within ten days. On the 7th of July the defendant told the plaintiffs that the sheep were sold to another person, and refused to let the plaintiffs have them. In an action to recover back the \$50 paid by the plaintiffs at the time of the sale, and damages, *Held* that if the defendant meant to enforce the contract, he should have given the plaintiffs notice that if they did not take the sheep, and pay the balance of the purchase money by a specified time, he should sell the sheep, and look to the plaintiffs for any deficiency. That having resold the sheep, without giving such notice, the defendant *rescinded* the contract *in toto*, and lost all right of action against the plaintiffs for their breach of it, and became liable to refund to them the \$50 paid on it. *Fancher v. Goodman*, 315
5. *Held*, therefore, that the plaintiffs were entitled to recover the \$50 paid by them, with interest thereon from the time the defendant rescinded the contract; but that, being themselves in the wrong, they could not recover any damages of the defendant for his rescission of the contract. *ib*
6. *Held also*, that it was not necessary for the plaintiffs to demand the \$50 of the defendants, before bringing their action to recover it back. *ib*
7. Where a subscription paper for the erection of a church edifice, containing certain conditions, was signed by B., who, during the erection of the building, repeatedly told those in charge of the work to go on and finish the edifice, and he would pay his subscription; *Held* that this was a sufficient waiver of the conditions in the subscription; and that the fact that the society, on the faith of these promises, and similar

promises from others, went on and finished the edifice, constituted a sufficient consideration to sustain the promises. *Reformed Protestant Dutch Church of Westfield v. Brown.*

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8. A promise, made for the benefit of a society thereafter to be incorporated, but before it is *in esse*, is valid and binding: and upon the subsequent incorporation of the society it can maintain an action upon the promise: especially where a portion of the work constituting the consideration is done subsequent to the incorporation. *ib*

9. The defendants were partners, engaged in building the A. and H. rail road. The plaintiff entered into a written contract with them to do a part of the excavation &c. on the road, and commenced work under such contract. Unexpectedly encountering a hard material, which was difficult of excavation, he gave notice to the defendants that he could not go on and excavate that material at the price named in the contract, and must abandon the work, unless the defendants would allow more than the contract price, for such material. The defendants told him to quit that portion of the work until some arrangement could be made in regard to it. The plaintiff did quit the work, for about two weeks, when it was resumed, under a new agreement, by which he was to have a reasonable compensation for excavating the hard material. *Held*, that this amounted to such a rescission of the original contract, in respect to that portion of the work, as would have precluded the defendants from maintaining an action to recover damages for its non-performance afterwards. *Hart v. Looman,*

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10. And the referees having found that the parties, after such rescission, made a new agreement, for the payment of a reasonable compensation to the plaintiff for that part of the work consisting of a hard material; it was *further held*, that such agreement was valid and binding, and would control, instead of the first agreement. *ib*

11. The defendants having agreed to pay ten per cent of the contract

price of the work in the stock of the rail road company, and having failed to tender such stock until after it had become depreciated and utterly valueless; *Held* that they had by their own neglect forfeited their right to pay the ten per cent in stock. *ib*

12. *It seems* that, under the contract, the plaintiff was entitled to the ten per cent in stock at its current market value, at the time payment should have been made or offered. *ib*

13. An agreement to pay a specified amount in the capital stock of a corporation, without naming any price, per share, or otherwise, is an agreement to pay stock to that amount in value, according to its market price, at the time. *ib*

14. And if performance of such a contract becomes impossible, by the depreciation of the stock so that it has no money value whatever, the amount agreed to be paid in stock is recoverable in money. *ib*

15. A stipulation, in a contract for work to be done upon a rail road, that all questions in dispute, as to any matters connected with, or growing out of the contract, shall be submitted to and decided upon by the chief engineer and consulting engineers of the company, is no bar to an action upon the contract. *ib*

16. There is no latent virtue in the word "toll," to exempt a contract in which it is employed, from the ordinary rules of construction; and a toll, like any other debt, cannot be demanded until its amount shall be ascertained. *Per CLERKE, J. Pennsylvania Coal Co. v. Delaware and Hudson Canal Co.,*

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17. The defendants (a canal company) agreed with the plaintiffs (a coal company) to allow the latter to transport coal on the canal of the former, in the same manner, and with the same facilities, as they themselves or any other persons might enjoy; providing specially for a rate of tolls, to be established on the 1st of May in each year, by ascertaining the quantity of lump coal belonging to the defendants, which at that period they should

have contracted to sell, and to deliver at Rondout, by transportation on their canal, during that year. The average price per ton of those sales should then be ascertained, and from that average price two dollars and fifty cents should be deducted; and one half of the remainder should be the toll per ton to be charged by the plaintiffs, for the transportation of their coal, during that year. In case the quantity of lump coal which, on the 1st of May, should have been sold, should be less than one half of the *estimated* sales for the year, then the toll, during that year, should be calculated on the average price per ton at which the sales should have been actually made. On a controversy arising, between the parties, under the latter clause of this agreement, *Held* that the employment of the word "toll," in the agreement, did not, *ex vi termini*, give the canal company any right to the collection of it before its amount was ascertained; and it appearing that the amount of the tolls payable by the coal company could not be precisely ascertained before the expiration of the year, it was *further held* that the canal company could not, previous to that period, enforce immediate payment from the coal company, on account, by a *proximate estimate* of the tolls. *ib*

18. Principles which govern courts of equity, in *reforming agreements* on the ground of inadvertence and mistake. *Kent v. Manchester*, 595

See DAMAGES, 2, 3.

MORTGAGE, 1, 3.

RAIL ROAD COMPANIES, 2, 3, 4, 5.

ANSWER.

See PARTIES, 1.

APPEAL.

1. An appeal does not lie to the county judge, from the decision of a jury summoned upon the application of commissioners of highways, determining that a *private road* applied for is necessary, and assessing the damages of a land owner. Consequently the county judge has no power to appoint referees to hear and determine an appeal of that nature. *People ex rel. Keenholts v. Robinson*, 77
2. Appeals from orders denying motions to vacate orders of arrest, where the party is on bail, and cannot therefore be seriously injured by the order of arrest remaining in force, are not to be encouraged. *Moers v. Morro*, 361
3. Upon an appeal in such a case, two adjudications having already been had that a *prima facie* case has been made out for the arrest of the defendants. viz. once on the granting of the order of arrest, and the second time on the motion to vacate it—the facts found by the court below, necessary to sustain the order, will be deemed established; unless the contrary can be clearly shown. *ib*
4. Where defendants decline to appear upon the trial, and then appeal to the general term, from the judgment rendered against them, without a case or exceptions, the appeal will be dismissed. *Pope v. Dinsmore*, 367
5. Although an objection that the complaint does not state facts sufficient to constitute a cause of action need not necessarily be raised by demurrer, yet the question should, in some form, be raised and passed upon at special term or circuit, before the defendant should be allowed to appeal. *ib*

ARBITRATION AND AWARD.

1. In actions on awards, as in other cases under the code, a defendant may put in an answer alleging facts sufficient to vacate the award, and pray an affirmative judgment to that effect. He is no longer driven to a cross action for that purpose. *Knawelton v. Mickles*, 465
2. Where, in an action upon an award, the answer alleged that the arbitrators examined witnesses in the presence of one party and in the absence of the other, and the defendant asked that for that cause the award should be set aside; and the referee found that issue in favor of the defendant, finding also that the arbi-

trators acted from misapprehension, and not corruptly; *Held*, that it was no ground of objection to the action, that the arbitrators were not made parties. *ib*

3. Where arbitrators proceeded to examine the premises in dispute, in the absence of one of the parties—the other party being present—and made various inquiries of, and called for and listened to the statements of, several persons as to their knowledge of the damage claimed by the party who was present, and the cause thereof, without the knowledge and in the absence of the other party; such statements not being made on oath, nor reduced to writing, and the arbitrators subsequently made an award in accordance with such statements; *Held* that the award was invalid, although there was no evidence showing that the arbitrators acted corruptly, or intentionally violated their duty. *ib*

ARREST.

See APPEAL, 2, 3.

ASSIGNEE.

A defendant may now avail himself of any *defense*, legal or equitable, which he may have to the claim or demand sued on, though the action be prosecuted by an assignee. An assignee still takes and prosecutes the demand subject to all the equities existing between the parties to the contract. *Western Bank v. Sherwood*, 383

See BOND, 4.

ASSIGNMENT

By a debtor, for the benefit of creditors.] *See* DEBTOR AND CREDITOR, 6 to 11.

ASSUMPSIT.

See LOAN.

ATTORNEY.

1. A combination, between a party and his attorney, to prevent the court

from compelling the production of important papers required as evidence, on a trial, by transferring such papers from one to the other, is, *it seems*, entirely distinct from a case where the confidential communications of a client are sought to be disclosed. *People ex rel. Mitchell v. Sheriff of New York*, 622

2. In no instance should such communications be disclosed, by an attorney and counsel, and the courts should carefully guard against any attempt to compel a counsel thus to betray the confidence of his client. But when the party and his counsel thus combine together to defeat the proper administration of justice, and seek to use this privilege as a cloak for that purpose, the act is not entitled to the protection of the court. *Per* INGRAHAM, J. *ib*
3. Where the papers sought for are required in evidence, and are needed for the purpose of identification, the counsel is, to that extent, bound to produce them; even if he can be protected from disclosing their contents. *ib*
4. The party himself may be required to produce the papers, where they are in court and in the possession of his agent, the attorney. *ib*

B

BANKS.

1. The provisions of the act of April 5, 1849, "to enforce the responsibility of stockholders in certain banking corporations and associations," &c., and those of the constitution, in aid of which that act was passed, apply to banks existing anterior to the constitution and the statute, and render the stockholders in such banks individually liable for the debts of the banks. *Matter of the Reciprocity Bank*, 369
2. The provisions of the constitution and of the act of 1849 are not void, when applied to pre-existing banks, as being in conflict with the tenth section of the first article of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of con-

tracts; where the charter reserves to the legislature the right to alter, modify or repeal the same, at any time. *ib*

3. Married women could own stocks in banks, in their own right, both at common law, and under the act of 1848, and the acts amending it; and the legislature had the power to alter the common law, so as to make them personally liable, to the amount of their stock. It has thought proper to do so, and the court is bound to enforce the liability. *ib*

See CONSTITUTIONAL LAW, 2.

BONA FIDE PURCHASER.

See MORTGAGE, 2, 5.

BOND.

1. In an action upon a penal bond, the judgment, in form, is for the penalty. The code has not changed the law in this respect. *Western Bank v. Sherwood*, 383

1. If there is a condition to the bond, and the cause of action arises from its breach, the plaintiff should state that fact, as one of the facts constituting his cause of action. But this will not affect his right to a judgment in form for the penalty. *ib*

3. Where, by the agreement of the parties, the whole penalty has become due, by the non-payment of an installment of interest, the law will not permit the obligee to collect it, if, on looking at the condition, it is found to be inequitable; and the obligor's rights will be protected, by controlling the execution, according to the law and practice prior to the code. *ib*

4. In an action upon a bond conditioned for the payment of money, brought by an assignee, the obligor alleged in his answer that the bond and a mortgage to secure its payment, were executed by him to one J., in consideration that J. would fulfill and perform certain covenants contained in an agreement between the parties, and that J. had failed and refused to perform his said covenants; *Held* that the matter thus set

up constituted a good defense, and that the referee erred in deciding that the same could not be set up against the assignee of the bond, and in excluding the evidence. *id*

See IMPRISONMENT FOR DEBT. TOWN.

BOARD OF SUPERVISORS.

1. After money has been properly raised by a board of supervisors, for a legitimate object, they have the power to change the appropriation, and devote the money to another object equally within the scope of their powers. *People ex rel. McConnell v. Baker*, 81
2. The power to raise a given sum of money, for several specified objects, necessarily includes the power to designate the number to which it shall be applied, and the amount which shall be devoted to each object. *ib*
3. After a board of supervisors have raised a fund for the purpose of building a fire proof clerk's and surrogate's office, they may rescind the resolution providing for the erection of such office, and appropriate the money, or a portion of it, to the erection of an addition to the county penitentiary. *ib*

BROOKLYN (CITY OF.)

1. The common council of the city of Brooklyn has authority, under the city charter, to add to the duties of the health officer of the city, as prescribed in the charter, the duty of inspecting, and granting certificates to police officers and candidates for the place of police officer, of their physical fitness for the duties imposed upon them. *Wendell v. City of Brooklyn*, 204
2. The common council has no power to pay the health officer for specific services, while he is receiving an annual salary from the corporation, as health officer; and if it sees fit to add to the duties of the office, by requiring from him the performance of a specified service, no implied assumpsit to pay him therefor can arise. *id*

See JUSTICE OF THE PEACE.

C

CARRIERS.

1. *Of passengers.*

1. Common carriers of passengers and their baggage are liable for the latter until its safe delivery to the owner. They are bound not only to safely carry the same to its place of destination, but there to deliver it, in a reasonable time and in a reasonable manner. *Cary v. Cleveland and Toledo Rail Road Company*. 35
2. And if baggage, belonging to a passenger, after reaching its place of destination, and while still in the possession of the carrier, is destroyed by fire, without any fault of the owner, the carrier is liable for its value. *ib*
3. A carrier of passengers may, by positive stipulation, relieve himself, to a limited extent, from the consequences of his own negligence or that of his servants. But to accomplish that object the contract must be clear and explicit in its terms, and plainly covering such a case. *Smith v. New York Central Rail Road Company*, 132
4. W. made a contract with the defendant to transport a lot of cattle upon its rail road, and was traveling with them, under what was called a "drover's pass," which contained a provision that "the persons riding free to take charge of the stock, do so at their own risk of personal injury from whatever cause." *Held* that this stipulation in the contract did not exempt the carrier from liability for gross negligence, or for the want of ordinary care. That the carrier was liable for what—independent of any peculiar responsibility attached to its calling or employment—would be regarded as fault or misconduct on its part; and was bound to observe reasonable care and precaution, employ persons of requisite skill, and possess vehicles fit for use and adapted to the nature of the service required. *ib*
5. And an action being brought by the administrator of W., against the carrier, for negligence in causing the death of W. by using a flattened wheel, which caused the car to bound and jolt, and finally threw it

off the track, it was *further held* that it was not erroneous to charge the jury that it was the duty of the defendant to provide competent and careful men, safe vehicles, and a properly constructed track, so far as ordinary care and diligence would enable them to do so; and that if the jury should find that the injury was caused by the insufficiency of the car by means of a defective wheel—the defendant's employees having been warned of the condition of the running apparatus of the car and its danger—they would be justified in considering the use of such a car in the transportation of passengers a reckless exposure of life, amounting to gross negligence, entitling the plaintiff to recover. *ib*

6. What circumstances will import a contract by an individual, as a common carrier, to transport another from New York to California; and what will be sufficient, as evidence, when submitted to a jury, to authorize a verdict to the effect that such person held himself out as, and assumed the duty of, a common carrier. *Williams v. Vanderbilt*, 491
7. A carrier of passengers from New York to San Francisco is bound to forward his passengers within a reasonable time; and when it is ascertained that one of the vessels forming the line has been lost, it is his duty to provide another with all reasonable diligence. *ib*
8. What amounts to reasonable diligence, in such a case. *ib*
9. Where one undertakes, as a common carrier of passengers, to carry a passenger the whole route from New York to California, he is liable for any breach of duty as such, notwithstanding separate tickets are issued to the passenger for the different portions of the route, signed by different persons. *ib*
10. What are proper items of damages, in an action for the breach of such a contract by the carrier. *ib*

2. *Of freight.*

11. A clause in a bill of lading, which directs the carrier to collect the freight of the consignee of the goods, on delivery, does not oblige the carrier to withhold the delivery of the

goods in case of the refusal of the consignee to pay the freight; and if the carrier delivers the goods to the consignee without requiring him to pay the freight, or if he fails or neglects to collect the freight from him, this will not discharge the liability of the consignor, to him, for it, nor constitute any defense to an action for such freight. *Jobbitt v. Goundry*, 509

12. The taking of a check from the consignor, by the carrier, for the amount of the freight, and giving a receipt acknowledging the payment of the freight, will not amount to a satisfaction of the carrier's claim for freight, as against the consignor, where the drawer has no funds in the bank, to meet the check; unless it is fairly inferable, from the evidence, that the carrier agreed the check should be received as payment. *ib*

See RAIL ROAD COMPANIES, 1, 2, 6, 12, 13.

CASES COMMENTED ON, &c.

1. The decision in *Brewster v. Silence*, (11 Barb. 144; 4 Seld. 207,) reaffirmed, and held to be the existing law; notwithstanding the case of *The Union Bank v. Coster's Ex'rs*, (3 Comst. 203.) *Church v. Brown*, 486
2. The case of *Welles v. The New York Central Rail Road Company*, (26 Barb. 641,) commented upon, and distinguished from the present case. *Per SMITH, J. Bissell v. New York Central Rail Road Company*, 602
3. The decision in *Wibert v. The New York and Erie Rail Road Company*, (19 Barb. 36,) reaffirmed; and the case of *Kent v. The Hudson River Rail Road Company*, (22 Barb. 278,) disapproved. *Jones v. New York and Erie Rail Road Company*, 633

CERTIORARI.

See CONTEMPT.
PARTIES, 3.

CHARITIES.

See CORPORATION, 12.

CHATTEL MORTGAGE.

1. Where personal property, which is mortgaged, has been wrongfully converted, an action to recover its value may be maintained by the mortgagee, although the money secured by the mortgage is not yet due, if there is a clause in the mortgage which authorizes the mortgagee, at any time he shall deem himself insecure, to take possession of the mortgaged property and sell it, to satisfy the debt. *Chadwick v. Lamb*, 518
2. When a creditor takes a chattel mortgage, to secure the debt due to him, he acquires thereby not only the right to the possession of the mortgaged property, but every interest in it that the mortgagor had, except the mere equity of redemption. *ib*
3. In an action by a second mortgagee of chattels, against a prior mortgagee claiming under a usurious mortgage, to recover for a wrongful conversion of the property, the plaintiff will be regarded as having only a special interest in the property, and he can recover only the value of that special interest, viz. the amount *remaining due* upon his mortgage. *ib*

COLLECTOR.

See SURREGATE, 2, 3, 4.

COMPLAINT.

1. A complaint, in an action for a breach of promise of marriage, alleged that the plaintiff being sole and unmarried, and competent to contract to marry, and the defendant representing himself to be sole and unmarried, and competent to contract to marry, the latter, in consideration of the plaintiff's promise to marry him, promised the plaintiff to marry her. It then averred that the plaintiff, confiding in such representation and promise, continued, and still was, unmarried; and that she had no knowledge or information to lead her to believe, that the promise and representations of the defendant were false or fraudulent; and it averred that the said repre-

sentations were false and fraudulent, and made with the intention to deceive; that the defendant then was, and still continues to be, a married man; and that his promise to marry was fraudulent, and to the plaintiff's damage; *Held* that the complaint stated sufficiently the defendant's promise to marry, and his representation that he was unmarried, and competent to marry the plaintiff; and that it was unnecessary to allege that he knew his representation to be untrue. *Blattmacher v. Saal*, 22

2. *Held also*, that the complaint set forth a good cause of action; that if the plaintiff could not recover for the deceit and damage, she might, upon the contract and promise to marry, which implied and involved a promise and agreement that the defendant was competent, legally, to marry. *ib*

3. Where a complaint against two defendants alleged that one of the defendants erected a building across an alley belonging to the plaintiff and thus obstructed his right of way; and that such defendant then transferred and conveyed the possession of the building to the other defendant, who kept, continued and maintained such obstruction; and the plaintiff prayed judgment for damages, against both defendants; *Held* that the complaint stated facts sufficient to show a cause of action against each defendant separately, but not a cause of action against them jointly; and that such causes of action could not, therefore, be united, in the same complaint. *Held also*, that the objection, of such misjoinder, might be taken by a joint demurrer. *Hess v. Buffalo and Niagara Falls Rail Road Co.*, 391

4. *It seems* that, in such a case, the defendants may move that the plaintiff elect which of the causes of action he will prosecute. *ib*

CONSTITUTIONAL LAW.

1. An act of the legislature, which prohibits the transportation, over a specified plank road, of any load of iron or iron ore, of more than two tons' weight, unless it be upon a vehicle with wheels having a tire of at

least six inches in width, is not unconstitutional and void on the ground that it operates as an obstruction upon the iron business and those engaged in it, which is not extended to other articles of freight, or classes of persons. *Seward v. Beach*, 239

2. An act of the legislature, altering the charter of a bank incorporated previous to the adoption of the constitution of 1846, is valid, if passed according to the provisions of that constitution. Hence a two-thirds vote in favor of it is not necessary. *Matter of the Reciprocity Bank*, 369

3. The court has power, under the act of April 5, 1849, to order an apportionment of the debts of a corporation among the stockholders, notwithstanding there is a large amount of assets in the receiver's hands not disposed of. *ib*

4. The constitutionality of the act of April 16, 1852, "to authorize any town in the county of Cayuga to borrow money for aiding in the construction of a rail road or rail roads from Lake Ontario to the New York and Erie, or Cayuga and Susquehanna rail road," must be deemed settled by the recent decisions. *Gould v. Town of Venice*, 442

5. Authority being given to the towns, by the statute, to issue bonds, instruments appearing on their face to have been executed in pursuance of that authority, and so far as appears, in accordance with it, are valid in the hands of, and may be enforced by, *bona fide* holders thereof; whether the prerequisites prescribed by the statute to the issuing of the bonds, beyond the organization of a rail road company, &c., and the filing in the county clerk's office of the assent of resident taxpayers, with the affidavit attached, as specified in the statute, were complied with or not. *ib*

6. Instruments without seal, issued by a town, which contain an acknowledgment that, in pursuance of the statute, and for the purpose of aiding in the construction of the rail road therein specified, the town owes, and a promise by the town to pay to —, or bearer, \$1000, with

interest at the rate of seven per cent, payable as therein mentioned, are negotiable; although the statute does not prescribe the form of the bonds, nor expressly provide whether they shall or shall not be negotiable. *ib*

7. The omission of a seal is not a fatal objection to instruments thus executed by a town, as being instruments not warranted by the law. *ib*

8. Although the statute specifies a "bond or bonds" as the instruments which it shall be lawful for the towns to execute, this is to be deemed as done with a view to the interests of the creditors only; and if they are willing to waive the proposed benefit and accept unsealed obligations, the towns cannot object that such obligations were not authorized. *ib*

See BANKS, 2.

CONTEMPT.

The supreme court cannot review, upon *certiorari*, the judgment of a court ordering a commitment for a contempt. *The People ex rel. Mitchell v. Sheriff of New York*, 622

See HABEAS CORPUS.

CORPORATION.

1. Under the 12th section of the general manufacturing act, (*Laws of 1848, ch. 40*), requiring every company incorporated under that act to make and publish a report of its condition, annually, within twenty days from the 1st of January, and providing that "if any of said companies shall fail to make and publish such statement, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made," those trustees who are guilty of the neglect of duty, and those only, are liable to the penalty mentioned in the statute. *Boughton v. Otis*, 196

2. For a neglect to make and publish the statement, on the part of the trustees in office on the 1st of January, trustees who are subsequently elected are not liable. *ib*

3. *Prima facie*, all stockholders in a corporation, at any particular period, are equally interested in the property and business of the corporation. *Per* INGRAHAM, *J. Jones v. The Terre Haute and Richmond Rail Road Co.*, 353

4. And when the directors undertake to distribute among the stockholders any portion of the funds or property of a corporation—whether it be called profits or not—all the then stockholders are entitled to an equal share in the fund, proportionate to their stock; whether they have been stockholders for a longer or shorter period. *Per* INGRAHAM, *J. ib*

5. Unless the charter gives the directors power to discriminate between the stockholders at different periods, in the distribution of profits, they are all entitled to share therein. *ib*

6. Where, by a resolution of the board of directors, a dividend is made to the persons then holding stock, without any discrimination, out of the surplus earnings of the corporation for a given period, payable at a future day, all who are stockholders on the books of the company, at the time the dividend is declared, are entitled to share therein. *ib*

7. *It seems* that a board of directors, in making a dividend, cannot limit it to persons holding stock at any given time, to the exclusion of others, who acquire stock before the dividend is declared, although subsequent to the date fixed by the board of directors. *ib*

8. Where the power to alter a charter is reserved, in express terms, in the act by which it is granted, and such power is subsequently exercised, by an authority adequate for that purpose, and in accordance with the forms prescribed by the constitution in force when the alteration is made, the law is not obnoxious to the objection that it violates the contract with the corporation contained in its charter. *Matter of the Reciprocity Bank*, 369

9. In respect to real estate situated in this state, claimed by a foreign corporation, it is for the courts of this state to construe the charter of such

corporation, and determine whether the corporation is authorized thereby to take or hold such real estate. *Boyce v. City of St. Louis*, 650

10. An adjudication upon the question of its corporate capacity, by a court of another state, can have no further effect or authority than the reasoning upon which it may have been founded gives it. *ib*

11. A foreign corporation, not authorized by its charter or by statute, to take and hold real estate, cannot take, by devise, lands lying within this state. *ib*

12. Nor can the charitable intention of the testator, in such a case, be carried into effect with the aid of the statute of 42d *Eliz.* *ib*

See RAIL ROAD COMPANIES, 5, 6.

COSTS.

See SURROGATE, 3, 4.

COUNTER-CLAIM.

In an action upon a due-bill, or promissory note, by the holder against the maker, the defendant set up as a counter-claim that one N., by an instrument in writing signed by him, became surety for the payee of the note and another person, in the sum of \$200; that N. afterwards died, and at the time of his death there was \$180 due and payable upon the said instrument, which the defendant paid. It appearing that N., who was the father of the defendant, devised certain lands to the latter, upon condition that he should pay the testator's debts, (of which the sum due upon the said instrument was one;) *Held* that the payment so made by the defendant could not be allowed to him as a counter-claim or set-off. *Lyman v. Newman*. 162

See JUSTICES' COURTS, 4.

COUNTY JUDGE.

See APPEAL.

COVENANT.

1. The right to further assurance, when stipulated for, passes to the successive grantees. It is a covenant that runs with the land, and as a consequence is assigned by a conveyance of the land. *Colby v. Osgood*, 339
2. Where a grantor conveys land with full covenants of seisin, warranty, right to convey free from incumbrances, and for further assurance; the covenants being made with the grantee, his "heirs and assigns;" and the grantee subsequently conveys the land to another, the latter may maintain an action, in his own name, against the grantor, for a breach of the covenant against incumbrances, in the existence of a mortgage which was a lien upon the premises at the time of the original conveyance. *ib*
3. A release of a mortgage is a "further assurance." *ib*

CREDITORS' SUIT.

See PARTIES, 4.

D

DAMAGES.

1. In an action for an injury to the inheritance, by cutting wood and timber, evidence of the comparative value of the premises, with or without the wood and timber, is admissible, as furnishing an appropriate criterion of damage, after a proper foundation has been laid by showing the acquaintance of the witness with that species of property. *Van Dusen v. Young*, 9
2. On the 22d of April, 1846, the plaintiff agreed to sell to the defendant a canal boat and a pair of horses, at the price of \$800, payable by installments of \$40 per trip: the boat to be employed in the business of the plaintiff, and the boat and horses to remain the property of the plaintiff, until the price should be paid. In pursuance of this agreement, the defendant made four trips with the boat, paying to the plaintiff \$40 each trip. About the 1st of September he abandoned the boat

and the employment of the plaintiff, retaining the horses, and the plaintiff resumed the possession of the boat in October thereafter, and subsequently sold the same to C. for \$550, without notice to the defendant. *Held* that the contract was put an end to, by the voluntary act of the parties, except so far as it affected or controlled their rights in respect to the question of damages. *Mallory v. Lord*, 454

DEATH BY WRONGFUL ACT, &c.

3. *Held also*, that treating the contract as broken, by the defendant, the plaintiff was entitled to recover such damages as resulted from the breach. And that, assuming the value of the boat and horses to have been the sum fixed as the price thereof, in the contract, the plaintiff's damages would be the difference or deterioration in value of the boat between the time when the defendant took possession, and the time when the plaintiff resumed the possession thereof; the value of the horses retained by the defendant; and any other loss or injury sustained by the plaintiff from the neglect or refusal of the defendant to carry his freight, with interest thereon, deducting the amount paid by the defendant upon the contract. *ib*

4. *Held further*, that the plaintiff, after having resumed possession of the property, had no right to sell the same at private sale, without notice to the defendant. And that it was error for the judge to charge the jury that the plaintiff was entitled to recover the \$800, the price fixed in the contract, and interest, after deducting the sum of \$550 for which he sold the boat to C., and \$160, the amount paid by the defendant, on the contract. *ib*

5. In an action against a rail road company, for negligence in not conveying a quantity of dried apples to market, within a reasonable time, the plaintiff cannot recover as damages the difference between the price of dried apples at the time the property in question should have been delivered, and the price at the time when the property was in fact delivered. *Jones v. New York and Erie Rail Road Company*, 633

See CARRIERS, 2, 3, 10.

CHATTEL MORTGAGE, 3.

1. In an action by the administrator of a deceased person, to recover damages for the negligence of the defendant, whereby the intestate was deprived of his life, to entitle the plaintiff to recover, it must appear affirmatively that the accident resulted wholly from the negligence of the defendant, and that the negligence and improvidence of the intestate did not contribute to bring it about. *Lehman v. City of Brooklyn*, 234

2. The negligence of the defendant must be made out and established by proof, and not be left to be inferred from circumstances. *ib*

3. Where there was a well in one of the streets of the city of Brooklyn, level with the grade of the sidewalk, and usually covered with a wooden cover having a square opening in the center, which was also covered with a lid, opening and shutting on leather hinges, and the intestate, a child four years of age, was found dead in the well, within half an hour after leaving his home; *Held*, in an action against the city, by the administrator of the child, to recover damages for negligence, that, considering the tender years of the child, his inability to take care of himself, and the nature of the accident, the plaintiff was bound to show how the accident occurred, and to throw some light upon the causes which led the child to the vicinity of the well, and the condition of the opening into the well, and whether it was closed or not when the deceased came there. *ib*

4. That merely showing the existence of the well, with its covering, and the child being found in the water, was not sufficient to entitle the plaintiff to recover, or to put the city upon the defense. *ib*

5. The interest which the next of kin have in the life of a person negligently killed, under the acts of 1847 and 1849, is merely pecuniary. The personal wrong done to, or the suffering of, the person killed, have nothing to do with the damages. Nor should the anguish and grief of his parents enter into the estimate of the amount to be recovered. *ib*

6. Where a father brought an action to recover for the negligence of the defendant, in causing the death of his son, a child four years of age, and recovered a verdict for \$1500; *Held* that the damages were unreasonable and excessive, and should have been merely nominal. *ib*

DEBTOR AND CREDITOR.

1. *Rights and remedies of creditors.*
1. A person claiming to be a creditor, with a warrant of attachment under the code, but with no judgment or execution for his debt, has no standing in court which will enable him to impeach and litigate the *bona fides* of a sale of goods by the alleged debtor, to a third person, which has been consummated by transfer and delivery of the possession before the lien of the warrant attached. *Hall v. Stryker*, 105
2. To enable a party to question and put in controversy the *bona fides* of a sale of goods, it must appear affirmatively that he is a creditor of the vendor. Not merely that he is a person claiming a debt or obligation due to him from the vendor, which he proposes to establish by proof; but the character in which the attacking party prosecutes the action, or interposes the defense, and claims to overthrow the sale or conveyance, must be settled, and put at rest, by the judgment or decree of a competent court. *ib*
3. Where a grant of land is made to one person, the consideration for which is paid by or in behalf of another, the legal title is in the grantee, notwithstanding the conveyance is made for the purpose of defrauding the creditors of the grantor, and upon a parol trust in his favor. And so long as the grantee holds such title, the property is subject to the claims of his creditors, to the same extent as any other property to which he has title. *Davis v. Graves*, 480
4. But until such creditors obtain a *lien* upon the property, the grantee's right of alienation is perfect in respect to it; and it is not a fraud upon his creditors for him to convey it to the real owner. *ib*
5. Until the creditors of the grantee have acquired liens upon such land, they have no legal or equitable claims in respect to it higher than, or superior to, those of the grantor; and if the fraudulent grantee reconvey such land to the grantor, before such creditors have acquired any lien thereon, the creditors have no right to have the conveyance set aside as fraudulent. *ib*
2. *Assignments for benefit of creditors.*
6. When an assignment for the benefit of creditors contains provisions which necessarily tend to hinder, delay or defraud creditors, these provisions are conclusive evidence of the design of the parties to the instrument, and the law therefore declares it void, as being within the prohibition of the statute. *Jessup v. Hulse*, 539
7. It is not necessary, in pleading, to point out the particular features or clauses of the instrument, which are objected to. *ib*
8. It is the intent to defraud upon which the statute fastens, and the law treats these directions or provisions as conclusive proof of such an intent. *ib*
9. A provision in an assignment for the benefit of creditors, directing the assignee "to sell, dispose of, and convey the said real estate and personal property at such time or times, and in such manner as shall be most conducive to the interests of the creditors" of the assignor, "and convert the same into money as soon as may be consistent with the interests of said creditors," renders the assignment void, inasmuch as it confers the power to *delay* making sales of the assigned property, and converting the same into money. *ib*
10. An assignment which authorizes a delay in bringing the assigned property to sale, is open to the same objection as a clause authorizing a sale upon credit, involves the same consequences, and must meet with the same condemnation. *Per EMOTT, J.* *ib*
11. The spirit of the later decisions is, that a debtor can go no farther than to direct the appropriation of

his property to the payment of his debts, and to select the person who is to convert and apply it. *Per* EMOTT, J. *ib*

See JOINT DEBTORS.
PARTNERSHIP, 1.

DECLARATIONS.

See EVIDENCE.

DEDICATION TO THE PUBLIC.

Where the owner of land dedicates the same to the public for a street, and then grants the land in fee before the public has taken possession, or made any use of the same, and the grantee and those holding under him possess and occupy the land for more than twenty-five years before the public asserts any claim or right founded upon the dedication, all right in the public will be deemed to have ceased. *Baldwin v. City of Buffalo*, 396

DEED.

1. A deed of land to trustees *de facto*, of an unincorporated religious society, conveys no title to the society. *Bundy v. Birdsall*, 31

2. It is the settled doctrine, in this state, that where the description in a deed clearly designates a piece of land as that conveyed, the description cannot be departed from by parol evidence of intent, or of acquiescence in another boundary line; unless such an adverse possession be shown as is in itself a bar to an ejectment. *Emerick v. Kohler*, 165

3. Where, in an action of ejectment, the line contended for by the defendant is clearly shown to be erroneous, no acquiescence by the plaintiff, short of twenty years, will bar a recovery according to the true line; unless there be an *estoppel in pais*. *ib*

4. To constitute a personal obligation upon a party taking a conveyance of lands incumbered by a mortgage, binding him to the absolute payment

thereof, something more is requisite than a mere statement, in the deed, that the conveyance is made subject to such mortgage. *Stebbins v. Hall*, 524

5. To create such a liability on the part of the grantee, the language of the deed should be either "subject to the payment" of the outstanding mortgage; or, that such mortgage "forms a part of the purchase money, which the grantee in the deed assumes to pay;" or some equivalent expression which clearly imports that an obligation is intended to be created by one party, and is knowingly assumed by the other. *ib*

6. In all the cases in which a party succeeding to the rights of another, in property, has been personally charged with the duties resting upon his predecessor, an agreement, express or implied, has been relied upon. In some instances, the assumption of the obligation has been by an express agreement, and in others it has been implied from the terms of the deed, or the circumstances of the transaction and the acts of the parties; but in no case has a party been charged, except in pursuance of his own agreement, and by his own consent. *Per* W. F. ALLEN, J., and BACON, J. *ib*

DEFENSE.

See RAIL ROAD COMPANIES, 7.

DEMURRER.

See PARTIES.

E

EVIDENCE.

In what cases the acts and declarations of one of several conspirators are admissible in evidence against the others. *Moers v. Morro*, 361

See DAMAGES, 1.

JUSTICES' COURTS, 5, 6.

OPINIONS OF WITNESSES.

PRACTICE, 1 to 5, 7.

RECEIVER, 4.

EXECUTION.

A buggy wagon, used in his professional business by a practicing physician, who is a householder, and has a family for which he provides, is exempt from levy and sale, by virtue of an execution issued upon a judgment recovered for the purchase money. *Van Buren v. Loper*. 388

EXECUTORS AND ADMINISTRATORS.

1. Where a power is given to executors to sell and convey real estate, and they fail to exercise the power within the period limited by the will, they cannot execute the power afterwards, so as to give a good title to a purchaser. *Richardson v Sharpe*, 222
2. If the will contains an express and direct provision that the executors are to sell the real estate within seven years from the time of the testator's death, this implies that they are not to sell after that time. *ib*

EXEMPTION ACT.

See EXECUTION.

F

FENCES

See RAIL ROAD COMPANIES, 14 to 16.

FORCIBLE ENTRY AND DETAINER.

A party in the peaceable and actual possession of lands, at the time of a forcible entry, is entitled to proceed under the statute relating to forcible entries and detainers, although he is neither seised of a freehold nor possessed of a term for years in the premises. *People ex rel. Kearney v. Carter*, 208

FOREIGN CORPORATIONS.

See CORPORATIONS, 9 to 12.

FOREIGN LAWS.

When a question arises in our courts, upon a transaction which has occurred in another state, and there is nothing to show what the law of that state is, and the transaction is of such a nature as to raise no presumption one way or the other, the court will follow the law of this state. *City Savings Bank v. Bidwell*, 325

FORFEITURE.

See INSURANCE (FIRE.)

FURTHER ASSURANCE.

See COVENANT.

G

GRANT.

See DEBTOR AND CREDITOR, 3 to 5.

GUARANTY.

1. A guaranty, indorsed upon an agreement for the sale of goods, and bearing even date therewith, by which a third person promises as follows: "I will be responsible for all such goods as Mr. White shall buy of the Messrs. Church, within one year from date, which shall not be paid for according to the terms of the within contract," is void, for the want of a consideration expressed therein. *Church v. Brown*, 486
2. The decision in *Brewster v. Silence*, (11 Barb. 144; 4 Seld. 207,) reaffirmed, and held to be the existing law; notwithstanding the case of *The Union Bank v. Coster's Ex'rs*, (3 Comst. 203.) *ib*

H

HABEAS CORPUS.

On a *habeas corpus* in a case of commitment for a contempt, only two questions can be examined; *first*, as to the jurisdiction of the court or officer making the commitment;

and *secondly*, as to the form of the commitment. If the jurisdiction is undoubted, and the commitment is sufficient in form, and contains the cause of the alleged contempt plainly charged therein, the prisoner must be remanded, and the writ discharged. The court has no power to inquire into the justice or propriety of the commitment. *People ex rel. Mitchell v. Sheriff of New York*, 622

HIGHWAYS.

See APPEAL.

HUSBAND AND WIFE.

1. As a general rule, as between the father and mother, the obligation to support a child rests primarily upon the father; but this rule is modified more or less by the peculiar circumstances of each case. *Burritt v. Burritt*, 124
2. In case of a separation or divorce, while the obligation continues to rest as a general rule, and independent of special circumstances, upon the husband, it is materially affected by the facts of each particular case, and may be regulated by the terms of the decree, if there be a judicial separation or divorce. *ib*
3. The award of the care and custody of the child to the mother must be presumed to carry with it the obligation to support, in the absence of evidence to the contrary; or at least to relieve the father from the obligation to furnish such support upon the call of the mother. *ib*
4. At all events he is not so liable without a previous demand and refusal, or an abandonment of the child; which must be regarded as equivalent to a demand and refusal. *ib*
5. The mere omission of the father to support, or the mother's support of the child in the absence and during the non-residence of the father, is not such a refusal to support as obliges the father to refund the expenses incurred by the mother. *ib*
6. To make the father thus liable in a case where a divorce has been de-

creed, and the care and custody of the child are awarded to the mother, and alimony is given to the wife, there must be special circumstances averred in the complaint, or appearing in the evidence, from which the obligation must arise, or may be reasonably inferred. *ib*

7. An action at law cannot be maintained upon a contract for the sale and conveyance of land, by the assignee of the vendor, against the husband of the vendee, who did not sign or execute the contract, to recover an installment of the purchase money. *Galusha v. Hitchcock*, 193
8. Where a wife acts as agent of her husband, and makes an express contract in writing, she can bind him thereby, only by executing the same in his name, and professedly as his agent, as in the case of all other agents. *ib*
9. If the contract is executed by the wife in her own name, it cannot be made out to be the contract of the husband, except by parol proof; which is inadmissible for that purpose. *ib*
10. Husband and wife cannot maintain an action in their joint names, to recover for the conversion of the separate property of the wife. In such a case the wife must sue alone. *Ackley v. Tarbox*. 512

See MARRIED WOMEN.

I

IMPRISONMENT FOR DEBT.

1. Where proceedings are instituted before a county judge, against a judgment debtor, under the "Act to abolish imprisonment for debt," and to avoid a commitment, for fraud, the debtor executes a bond, with two sureties, conditioned that he will, within thirty days, "apply for an assignment of all his property, and for his discharge as provided in the 12th section of the said act," and "diligently prosecute the same until he shall obtain his discharge;" and the judgment debtor accordingly makes an application to the county judge of the county in which he re-

sides, and on the day fixed for the hearing, the county judge is absent from the county, and disabled, by sickness, from hearing it, the obligors in the bond are not thereby excused from performing their obligation and discharged from liability thereon. *Cobb v. Harmon*, 472

2. If, after an application has been made to the county judge of a particular county, it is found that such judge cannot entertain it, within the thirty days, and grant the discharge, the judgment debtor is bound to continue the proceedings before some other officer, if any one can be substituted, in time. *ib*

3. Under such circumstances, the county judge of an adjoining county can be procured to attend at the time and place specified in the notice, and continue the proceedings, in the same manner and to the same effect as if they had been commenced before him. And it is the duty of the judgment debtor to procure such attendance, and to prosecute the proceedings before the substituted judge. *ib*

INFANT.

In an action *ex delicto*, for an injury to the plaintiff's property occasioned by the wrongful act of the defendant, the infancy of the defendant is no protection. He is as fully liable for the damages sustained as if he were of full age. *Conklin v. Thompson*, 218

INJUNCTION.

1. Where land worth \$1200 had been entered upon by a municipal corporation, under and by virtue of proceedings regular in form, for the purpose of opening a street thereon, and the sum of one dollar had been awarded to the owner as a compensation therefor; *Held* that the owner was entitled to an injunction to restrain the corporation from proceeding further in appropriating the land and opening the street. *Baldwin v. City of Buffalo*, 396

2. In such a case a common law *certiorari* would afford the owner no re-

dress. It would not thereby be disclosed that the commissioners had not awarded him a just compensation. It could not be legally known that one dollar was not a just compensation for the land to be taken. *Per MARVIN, J.* *ib*

3. A suit in equity will lie, in favor of a land owner, against a municipal corporation, to restrain it, by perpetual injunction, from entering upon and taking possession of the land, and opening a street thereon, where the claim of the corporation is apparently valid, upon the face of the proceedings, and it is necessary to aver and prove an extrinsic fact in order to establish the invalidity of the proceedings; as, for example, that the commissioners have only awarded to the plaintiff one dollar for property worth \$1200. *ib*

INSURANCE COMPANIES.

1. A provision in the charter of a mutual insurance company organized under the act of April 10, 1849, relative to "the incorporation of insurance companies," that the corporation may divide applications for insurance into two or more classes, according to the degree of hazard, and that the premium notes shall not in such case be assessed for any losses, except in the class to which they shall belong, is valid, and not in conflict with any part of the act under which the company is formed. *White v. Coventry*, 305

2. And a company thus formed having divided its business and risks, pursuant to its charter, into two distinct classes or departments, viz. a *farmers'* department, and a *commercial* department, and taken notes for risks in the latter department, which notes were afterwards assessed by the receiver of the corporation, to pay losses in that department; *Held* that an action would lie, by the receiver, to collect an assessment so made. *ib*

3. Parties who have contracted with a corporation, as such, cannot afterwards raise the objection that the company was not legally incorporated. *ib*

4. If there are any defects in the organization of a company, they will be cured by a subsequent act of the legislature which treats it as an existing corporation, and changes its name. *ib*

See MORTGAGE, 18.

INSURANCE (FIRE.)

1. The plaintiff, on the 28th of March, applied to the agent of the defendant for insurance, who gave him a receipt acknowledging the payment of the premium, and stating that the policy was to take effect on that day at noon. The premium was not actually paid, at the time, it being agreed that the plaintiff might send it to the agent at his convenience. The property insured was destroyed by fire on the 7th of April. The premium was sent to the agent immediately after the fire, and he accepted the money, without having heard of the loss, and sent the application, together with the premium, to the defendant. The defendant thereupon, without any knowledge of the fire, forwarded a policy for the plaintiff to the agent, but subsequently, on being informed of the loss, instructed him not to deliver the same. *Held* that when the defendant accepted the premium, and forwarded the policy to its agent for delivery, the agreement to insure was complete and ratified, as of the 28th of March; and the plaintiff was entitled to a specific performance thereof by the delivery of the policy to him and the payment of the amount of the loss. *Whitaker v. Farmers' Union Ins. Co.*, 312
2. A stipulation in a policy of insurance, requiring the insured to sue, if at all, in twelve months, operates as a forfeiture, and is therefore to be construed strictly. Slight evidence of waiver, as in other cases of forfeiture, will be sufficient to defeat its application. *Ripley v. The Aetna Ins. Co.*, 552
3. The court, to aid a forfeiture, will not scrutinize very closely the verdict of a jury on such a point; nor the rulings of the judge at the trial, unless very clearly erroneous. *ib*

4. A policy of insurance was based on a written survey, in the form of question and answer. To the question whether there was a watchman in the mill during the night, the assured answered, "There is a watchman nights;" and to the question whether the mill was left alone at any time after the watchman went off duty in the morning, they answered, "Only at meal times, and on the sabbath, and other days when the mill does not run." The fire occurred between three and four o'clock in the morning, on Sunday, when no watchman was present. And it appeared that by the custom of the mill no watch was kept, from twelve o'clock Saturday night to twelve o'clock Sunday night. *Held* that by express terms, as well as by custom, Sunday was excepted from the stipulation; and that the insurers were not released from their liability, by the omission of the assured to keep a watchman in the mill on that day. *ib*

J

JOINT DEBTORS.

Where joint debtors reside in different states, they may be sued separately in the states having jurisdiction of their respective persons or property; and a judgment in such case, against one, in one state, is no bar to a recovery against the others, in another state. *Brown v. Birdsall*, 549

See LOAN.

JUDGMENT.

1. No portion of territory within another state can be levied upon, and sold, by virtue of any proceeding or judgment of the courts of this state. *Runk v. St. John*, 585
 2. Such a proceeding is entirely void; and any act, committed by citizens of this state, founded upon it, or induced by it, by which the owners are sought to be deprived of their land, should be declared equally void. *ib*
- See ACTION, 2, 3.
BOND, 1, 2.
CORPORATION, 10.
JUSTICES' COURTS, 2 to 4.

JUDGMENT DEBTORS.

See IMPRISONMENT FOR DEBT.

JURY.

See PRACTICE, 1, 2, 4, 7.

JUSTICES' COURTS.

1. The verdict of a jury, in a justice's court, should not be set aside simply because the constable having them in charge has sought to interfere with their deliberations, and has urged them to give their verdict to the prevailing party. *Baker v. Simmons*, 198
2. Where an action was brought, in a justice's court, for taking personal property, and the defendant put in an answer containing a general denial, and the justice, in his return, stated that he entered "judgment for damages, with costs, \$2.74," without stating in whose favor; *Held* that it was to be inferred, from the return, that the justice rendered judgment against the defendant. For some amount of damages, with \$2.74 costs; no claim being alleged or proved, to authorize the justice to award damages to the defendant. *Slaman v. Buckley*, 289
3. *Held also*, that if the judgment was in reality for the defendant, the plaintiff should have procured an amended return to show that fact. *ib*
4. The code, in prohibiting the bringing of an action in the same county, upon a justice's judgment, within five years after its rendition, does not prevent the use of such a judgment as a defense, set-off or counterclaim; especially by an *assignee* thereof. *Clark v. Story*, 295
5. Notwithstanding the defendant, in a suit before a justice of the peace, fails to appear at the trial, the plaintiff must establish his cause of action by legal evidence. *Perkins v. Stebbins*, 523
6. Evidence that one is reputed to be the agent of another, is incompetent testimony to establish an agency and thus charge the alleged principal. *ib*

JUSTICE OF THE PEACE.

1. The office of justice of the peace is not a town but a county office, and therefore is not within the letter of the 15th section of the 11th title of the act of April 17, 1854, to consolidate the cities of Brooklyn and Williamsburgh and the town of Bushwick, which provides that the terms of office of the city and town officers elected or appointed for the cities of Brooklyn and Williamsburgh and the town of Bushwick shall expire on the first day of January, 1855. *People ex rel. Kearney v. Carter*, 208
2. Where H., a justice of the peace of the city of Brooklyn prior to the consolidation, continued in his office of justice until after the consolidation took effect, and then resigned, and the governor of the state issued a commission to J., dated January 9, 1856, appointing him a justice of the peace for the city of Brooklyn, in the place of H. resigned; *Held* that the appointment was invalid. *ib*
3. *Held also*, that the governor having no power to fill the vacancy, he could not bestow upon J. the outward signs and symbols of the office, and J. could not therefore be said to be in by color of title, so as to make his acts legal, and his warrant a protection to persons executing it. *ib*

L

LANDLORD AND TENANT.

1. When the estate out of which rent issues is gone, and the demised tenement has absolutely ceased to exist, the rent must terminate, and the obligation to pay it is at an end. *Graves v. Berdan*, 100
2. Where the plaintiff leased to the defendant certain rooms and passage ways in the basement, the ground story and on the second floor of a building, for a term of years, taking from the lessee a covenant to pay the rent, but not covenanting to rebuild; and the building was afterwards accidentally destroyed by fire, and no erection was substituted for it by the plaintiff of a height

equal to the second floor of the former edifice, or upon that part of the ground which was covered by the stores occupied by the defendant; *it was held* that the lease was to be construed as a lease of apartments—of a portion of a building only—and that the destruction of such apartments constituted a good defense to an action upon the covenant, for rent subsequently accruing. S. B. STRONG, J., dissented. *ib*

3. Where there is no express agreement, between landlord and tenant, as to the price to be paid by the latter for the use and occupation of premises, the landlord should be allowed what the use of the premises is reasonably worth. *Serantom v Booth*, 171

4. The fact that a conversation has taken place between the parties, in which both parties supposed an agreement was made as to the amount of rent to be paid, will not prevent the landlord from recovering upon an implied agreement, where it appears that the parties *differed* in their understanding of the amount to be paid. *ib*

LEASE.

1. The covenants in a lease were, that on the last day of the term the lessees would surrender the demised premises, "and all the improvements that may have been placed thereon by the said" lessees, "and which improvements are to belong to" the lessors, "*and all of which are to be surrendered up in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.*" *Held* that the parties intended, the one to surrender, and the other to receive and accept, at the termination of the lease, all the improvements which should be placed thereon by the tenants during the lease; and that such improvements embraced all additions, erections or alterations made by the tenants during the term, and such as were used by them in the enjoyment of the lease. And that, on the expiration of the term, the improvements became the property of the lessors,

who had a right to retain them. *French v. Mayor &c. of New York*, 363

LIMITATIONS, STATUTE OF.

1. A debt secured by a sealed mortgage, and an unsealed note instead of a bond, may be enforced by a foreclosure of the mortgage, after the expiration of six but before the expiration of twenty years from the time when the debt became due. *Pratt v. Huggins*, 277

2. The lapse of six years since the maturity of the note, without any subsequent recognition or acknowledgment of the debt, is not conclusive evidence that the mortgage has been paid. *ib*

3. The provision of the statute of limitations, making the lapse of six years a bar, in such a case, is in terms confined to an action *at law* on the *note*; and does not operate to defeat a remedy on the *mortgage*, by which a court of equity cuts off the equity of redemption. *ib*

LOAN.

1. On a joint loan of money to two, the law, in the absence of any fact or circumstance, except the mere loan, will imply a joint promise to repay it; but if the lender agrees to take, and does take, the express promise of one of the two for the repayment, there is no room or occasion for the law's raising a joint implied assumption. *Underhill v. Crawford*, 664

2. Where a lender, upon making a loan of \$500, accepted, as security for the repayment thereof, two promissory notes—one being for \$225, and signed by C. as maker, and by M. as "surety," and the other being for \$275, and signed by C. alone—and the money was paid to C. by the lender; *Held*, that the legal presumption arising from these facts was, that the \$500 was loaned to C., and not to him and M. jointly; and that the lender agreed to look to C. alone for payment. That this presumption was not conclusive, however, but might be rebutted. *ib*

3. *Held also*, that in an action, by the lender, against C. and M. jointly, it was erroneous for the judge, under these circumstances, to submit the question of the liability of M. for the amount of the \$275 note to the jury. *ib*
4. That the subsequent use, or participation in the use, of the money by M., was immaterial as regarded the question of his liability to repay it, if he was not originally liable as borrower. *ib*
5. And that if the debt was the debt of C. alone, and M. was not originally liable, any subsequent parol promise by M. to pay the \$275 note was void by the statute of frauds. *ib*

M

MANDAMUS.

1. Where an alternative mandamus, directed to the attorney general, commands him to certify that certain suits in the name of the people, in which costs were adjudged to the defendants, were duly instituted as by law required, and the attorney general, in his return, states that no appropriation has been made, by the legislature, for the payment of such costs, which allegation is admitted by demurrer, a peremptory mandamus will not be granted. *People ex rel. Staats v. Tremain*, 96
2. So held in respect to costs adjudged to the defendants in suits brought by the district attorney of Kings county, for penalties under the Metropolitan Police Law. S. B. STRONG, J., dissented. *ib*
3. A mandamus will not be granted, where it would be fruitless, and ineffectual to relieve the relator. Nor, when the object is impossible of attainment, should the court compel a single step towards it. *ib*
4. The constitutional prohibition against the payment of any moneys out of the state treasury, except in pursuance of an appropriation by law, is a sufficient reason for denying a mandamus to compel the making of a certificate by the attorney general to enable the relator to ob-

tain payment, out of the treasury, of a claim for which no appropriation has been made. *ib*

MARRIAGE.

Action for breach of promise of.] See COMPLAINT.

MARRIED WOMEN.

1. Married women could own stock in banks, in their own right, both at common law, and under the act of 1848 and the acts amending it; and the legislature had the power to alter the common law, so as to make them personally liable, to the amount of their stock. It has been thought proper to do so, and the court is bound to enforce the liability. *Matter of the Reciprocity Bank*, 369
2. Where a married woman purchases a farm, and takes a conveyance thereof, to herself, in fee, executing a mortgage thereon for the purchase money, and she, in the absence of her husband from the state, occupies the land, and cultivates it at her own expense, she is entitled to the crops; and a purchaser thereof, from her, will acquire a good title thereto, as against the creditors of the husband. *Van Ellen v. Carrier*, 644
3. The fact that upon the purchase of land, by a married woman, her husband joins her in giving a mortgage upon the land, to secure the payment of the purchase money, will not affect the wife's title to the land. *ib*

MASTER AND SERVANT.

1. Where a servant, employed to work upon a farm by the month, directs his son, an infant, under his control, to do an act upon the farm, which is within the scope of the servant's employment, such act will be considered the act of the servant, and if another person sustains damage by the negligent manner in which the act was performed, the master is liable. *Simons v. Monier*, 419
2. Where a servant, employed to work upon a farm, is directed by the master to summer fallow a particular

piece of ground, the cutting and removing of the brush growing upon it is a necessary incident to the preparation of the ground for the plow, and will be held to have been embraced in the general directions.

ib

3. The rule of liability against a master for the act of his servant, is the same precisely, whether the servant is employed in the care and management of real or personal property; except, perhaps, in the single instance where the act complained of, in respect to real estate, amounts to a nuisance.

ib

4. The master's liability does not extend to the negligent acts of his servant's agent or servant, unless the servant of such master has directed the particular act, or is so connected with it as to make the negligence his own, in fact as well as in law.

ib

5. Where a servant employs another to do the work generally, which it is his duty to do, and the agent, while so employed, of his own volition, and without the knowledge or direction of the servant employing him, does an act which occasions an injury to a neighbor, his act will be imputed to, and charged upon, his employer, and not upon the master.

ib

MECHANICS' LIEN LAW.

1. The lien given by the act of April 16, 1852, "for the better security of mechanics and others erecting buildings and furnishing materials therefor," in certain counties enumerated therein, does not extend to a case where, without any express contract on the subject, lumber merchants furnish to a person who is building a house and barn for himself, lumber, which is used by him in the erection of his buildings. *SHANKLAND, J. dissented. Hatch v. Coleman,*

201

2. Such lien is only given to the material-man when the materials have been delivered in pursuance of a previously existing contract with the owner of the building, or with the contractor for erecting the same.

ib

3. The act of 1852 has no application to a case where the materials are furnished to a person who is erecting his own building, or altering or repairing the same.

ib

4. A lien under the mechanics' lien law in the city of New York ceases, after one year from the time of filing, unless the party filing it commences proceedings in the court of common pleas, within that time, to bring it to a close. And the fact of the person asserting the lien being made a party to an action to foreclose a mortgage upon the property, will not relieve him from the consequences of his neglect to bring the lien to a close. *Noyes v. Burton,*

201

5. During the year, the supreme court can recognize the lien as existing, and can continue the lien on the property, or keep its proceeds in court, subject to the lien, if proper proceedings are taken to enforce it; and it may, perhaps, obtain jurisdiction so far over the subject matter as to order the lien to be discharged by payments, if it is brought to a close within the year, or if proceedings are still pending for that purpose. But it can give no judgment ordering the property to be sold to satisfy the lien, either before or after the year expires.

ib

6. A lien under the mechanics' lien law cannot be asserted where the person alleged to be the owner of the premises did not hold the fee at the time the notice of lien was filed, he having previously conveyed the premises to another.

ib

7. An innocent purchaser from a person obtaining his title and having his deed recorded previous to the filing of a notice of lien, is not bound to take notice of any lien filed after his grantor's deed was recorded.

ib

MORTGAGE.

1. A mortgage, given to secure the payment of the purchase money of a farm, provided that the mortgagor should deliver all the wood he might cut upon the mortgaged premises, upon the line of the N. Y. Central rail road, at the place designated by the rail road company; that the

mortgagee should have a lien upon such wood, for the purchase money, until the same should be fully paid; and a similar lien upon the crops &c.; that the mortgagee should have the right to demand and receive from the rail road company three dollars for every cord of wood so delivered; and that the mortgagor should from time to time, on the demand of the mortgagee, execute and deliver to him such chattel mortgage or mortgages as might be necessary to perfect and perpetuate the lien, until the purchase money should be fully paid, &c. *Held* that this was a valid agreement; and although it could not take effect until the wood should be cut and severed from the freehold, yet it attached instantly, as the wood became personal property; and that it should be enforced against the mortgagor, and all persons claiming from and through him, with notice of the lien thus created. *JOHNSON, J.* dissented. *Wood v. Lester,* 145

2. *Held also*, that a creditor of the mortgagor, who had notice of the prospective lien of the mortgagee upon the wood, before his rights attached by virtue of an execution issued upon a judgment subsequently recovered against the mortgagor, was not a *bona fide* purchaser, but took the wood subject to the prior equitable rights of the mortgagee. *ib*
3. That the agreement for the lien was neither a chattel mortgage nor a sale of chattels, because, at the time it was made, the subject matter of the lien was not in existence as personal property; and therefore was not affected by the statutes concerning sales and mortgages of chattels. *ib*
4. That the provision for executing a chattel mortgage, &c. on request, was, at most, cumulative, and did not at all qualify, or affect the validity of, the lien previously stipulated for. *ib*
5. That in respect to the grass or hay upon the premises, there being no evidence that the subsequent judgment creditor had any notice or knowledge of the mortgagee's lien thereon, before he purchased the same of the mortgagor, he must be

deemed a *bona fide* purchaser thereof, and entitled to hold it, discharged of such lien. *ib*

6. Where a party brings a suit, as assignee of a mortgage, to foreclose the same, and fails in such suit in consequence of a defect in his title as assignee, the judgment of dismissal is no bar to a second action of foreclosure, brought by him after he has perfected his title by taking the requisite assignments. *Mitchell v. Cook,* 243
7. The defendants executed a mortgage for \$1400 to C., an individual banker, doing business under the name of the White Plains Bank. C. transferred the mortgage to the comptroller, to secure the redemption of the circulating notes of the bank. After such transfer was made, the defendants, with notice thereof, paid \$1000, upon the mortgage, to the cashier of the bank. The plaintiff advanced \$1400 to C. on an agreement that C. should procure from the comptroller a re-assignment of the mortgage, for the plaintiff's benefit. C. paid that sum to the comptroller, and took a transfer of the mortgage, to himself, and delivered the security to the plaintiff, but without executing any formal assignment to him. In an action brought by the plaintiff, as assignee of the mortgage, to foreclose the same, the court of appeals decided that the assignment from the comptroller to C. was void, for want of authority in the comptroller to make the same, and that the plaintiff therefore had no title as assignee. The plaintiff having subsequently procured assignments of the mortgage, from C. and from the bank, brought this action to foreclose the same mortgage. *Held*, 1. That the judgment of the court of appeals, in the former suit, was not a bar to the present action, on the ground of the question being *res adjudicata*. 2. That after the assignment of the mortgage, to the comptroller, the cashier of the bank had no right to receive a payment thereon; and that the plaintiff, being a *bona fide* assignee without notice, was not bound thereby. 3. That after the mortgage had been reassigned by the comptroller, to C., the latter, and the then owner of the bank, had a

right to assign and deliver the mortgage to the plaintiff, who had furnished the money to pay it, upon the faith of an agreement that he should become the owner. *ib*

8. Where a notice of sale, on a statute foreclosure, was first published on the 30th day of April, and lastly on the 16th day of July, being published twelve times in twelve successive weeks, once in each week, the day named in it for the sale being the 24th of July; *Held* that the notice was published for twelve weeks successively, within the meaning of the statute prescribing the time and manner of publication. *Howard v. Hatch*, 297

9. A publication is sufficient, if it be made once in each week for twelve weeks successively, although all the publications are made within 78 days; provided the first is 84 days prior to the day of sale specified in the notice, exclusive of the day on which it is made. *ib*

10. The affidavits of the publication and affixing of the notice of sale, &c., need not be *recorded*, in order to pass the title to the purchaser at a sale of mortgaged premises under a statute foreclosure. *ib*

11. Where a mortgage was assigned to T., as "Treasurer of Madison University, and to his successors in office;" and he took the same, and held it, and foreclosed it by advertisement, under the statute, in his official character, for the corporation; stating in his notice of sale that he, "as such treasurer," was the owner and holder of the mortgage; *Held* that in the absence of all proof on the subject, the court would presume that T., as treasurer of the corporation, had authority to foreclose the mortgage by advertisement, and to sell the premises. And that, having such authority, his purchase of the premises at the sale, for himself, for a less sum than was due on the mortgage, did not render the sale void, or prevent him from conveying a good title to a purchaser. *MASON, J.*, dissented. *ib*

12. Where, subsequent to the execution of a mortgage, the premises covered by the mortgage are sold

by the mortgagor, in separate parcels, to different purchasers, who have no notice of the mortgage, one of whom takes a conveyance executed and delivered prior to the giving of the deed to the other, while the latter conveyance is first recorded; in an action to foreclose the mortgage, the purchaser whose deed is first *executed* and delivered takes precedence over him whose deed is first *recorded*; and he has the prior equity, in respect to the order in which the several parcels shall be sold. *Ellison v. Pecare*, 333

13. On the 12th of March, 1855, P. executed to B. a mortgage, which recited that B. had signed as surety for P. a note made by P. for \$1500, dated on that day, and payable to the Rochester City Bank ninety days after date; and that B. had agreed with P. to sign as surety, or indorse, other notes for P. payable at the Rochester City Bank, or some of the other banks in Rochester, to an amount not to exceed \$7000. The mortgage contained a condition that P. should indemnify B. and save him harmless against said note of \$1500, and against all other notes which B. might sign as surety or indorse with or for P. On the 5th of July, 1855, B., at the request and for the accommodation of P., signed, as surety, a note made by P. for \$1000, payable to W. or bearer, twelve months after date. *Held*, 1. That assuming that the note last mentioned was embraced in the condition of the mortgage, the mortgage was security to B. in respect to two classes of notes which he might sign or indorse for P.; first, the note for \$1000 already executed, payable at the Rochester City Bank, and other notes payable at any of the other Rochester banks, not in the whole to exceed \$7000; and second, notes payable elsewhere, or not mentioning any place of payment, to an indefinite amount. 2. That the note of July 5. 1855, for \$1000, belonged to the second class of notes, and that the mortgage, in reference to that note, must be regarded and treated precisely as if B. was indemnified, by the mortgage, only as to the second class of notes. 3. That in respect to that note the mortgage was not entitled to priority under the recording

acts, as against a junior mortgagee in good faith; the defect in such mortgage as constructive notice, under those acts, being that no limit to the extent of B.'s liability in regard to the second class of notes, was fixed; that it might be increased indefinitely; and that it afforded a dangerous facility for a fraudulent substitution of notes. *Babcock v. Bridge*. 427

14. A subsequent assignee of a bond and mortgage, for a valuable consideration paid at the time, and whose assignment is first recorded, has a perfect title to such bond and mortgage, under the statute, as against a prior assignee thereof, the assignment to whom is not recorded. *Pickett v. Barron*, 505

15. To constitute a *bona fide* purchaser, within the meaning of the recording acts, the party receiving the subsequent conveyance must not only have received the same without notice of the prior unrecorded deed, but he must have received the same upon some *new consideration*, advanced at the time, or must have relinquished some security for a pre-existing debt due him. *ib*

16. And when a party has obtained the legal title, if he has paid but a part of the consideration or value of the property—the residue of such consideration being a pre-existing debt—he is to be considered a *bona fide* purchaser, *pro tanto*, only. *ib*

17. Where there is a surplus arising from the sale of mortgaged premises, after paying the mortgage debt, such surplus may, in the absence of any contesting creditors, be applied to the payment of another debt, owing by the mortgagors to the assignee of the mortgage; the validity and amount of such debt being previously ascertained upon a reference for that purpose. *Beckman Fire Ins. Co. v. First Methodist Episcopal Church*, 658

18. An insurance company, incorporated under the general act for the incorporation of insurance companies, being by that act allowed to invest on bond and mortgage, and having taken an assignment of a bond and mortgage, is authorized to purchase a claim against the mortgagors, and

to have the same paid out of the surplus moneys arising from the sale of the mortgaged premises; the purchase and assignment of such claim being considered as an investment on bond and mortgage. *ib*

Presumption of Payment.] See PRESUMPTION.

See DEED, 4, 5.

LIMITATIONS, STATUTE OF.

MUNICIPAL CORPORATIONS.

See INJUNCTION.

N

NEGLIGENCE.

See DEATH BY WRONGFUL ACT, &c.

MASTER AND SERVANT.

RAIL ROAD COMPANIES, 8 to 13, 15, 16.

NUISANCE.

1. Every continuance of a nuisance is a fresh nuisance, and entitles the party injured to sue for damages. *Beckwith v. Griswold*, 291
2. A recovery in an action for changing the channel of a creek and diverting the water thereof by means of obstructions, so as to flow the plaintiff's lands, is no bar to a subsequent suit to recover damages for a similar injury, sustained since the commencement of the former suit. And this, although the complaint in the second suit does not refer to the former suit, or claim damages for *continuing* the obstruction or nuisance. *ib*
3. The recovery in the second suit will be limited to the damages sustained by the plaintiff since the commencement of the former suit; and the complaint, if defective, may be amended on the trial. *ib*

O

OFFICE.

The remedy for an intrusion into, and usurpation of, a public or corporate

office, was an information in the nature of a *quo warranto*, filed by, and in the name of, the attorney general, upon his own relation, or upon the relation of a private party. The remedy is still substantially the same, under the code, except that it is an action in the place of an information, and is still brought by the attorney general. *Per BROWN, J. Parish of Bellport v. Tooker*, 256

OPINIONS OF WITNESSES.

1. In an action upon a promissory note, a teller in a bank was shown the note, with a guaranty written across the back, and the defendant offered to prove by him that the portion of the guaranty written across the fold in the paper was written since the paper had been folded and soiled, or stained; and to ask him whether, in his judgment, from the lustre and brightness of the ink, the guaranty could have been written as long as six years ago. *Held* that upon these questions the opinions of witnesses were not admissible, even though the witnesses were *experts*. *Sackett v. Spencer*, 180
2. In an action to recover for damage done to the plaintiff's land, and the wood and timber thereon, through the negligence of the defendant in setting fire to brush on his own farm, it is erroneous to ask a witness, from what he saw, how much damage the fire did to the plaintiff's farm; on the ground that it calls for an opinion from the witness on a question of damages, which belongs to the jury to determine. *SMITH, J.*, dissented. *Simons v. Monier*, 419

P

PARENT AND CHILD.

See HUSBAND AND WIFE, 1 to 6.

PARTIES.

1. An objection on account of the non-joinder of a person as plaintiff must be presented by a demurrer or answer. *Van Deusen v. Young*, 9
2. Joint owners of land, deriving their title from a common ancestor, to-

gether represent the estate which their ancestor had in his lifetime; and for an injury to their common property, where the damage is common to all, they may maintain a joint action. *ib*

3. Where the issuing of a common law certiorari to remove into the supreme court for review, proceedings had before referees appointed by a county judge to hear and determine an appeal from the order of commissioners of highways laying out a private road, the relator dies, leaving a will by which she appoints an executor, and authorizes him to control and manage the real estate devised, during the minority of the devisees, and "to receive the rents, issues and profits thereof," and apply them for certain specified purposes, the executor is the trustee of a valid active trust, and as such has the legal title and an actual estate in such real estate; and is the proper person to continue the proceedings upon the certiorari, as relator, in the place of his testatrix. *People ex rel. Keenholts v. Robinson*, 77
4. Where an action, in the nature of a creditor's suit, is brought by a receiver appointed in proceedings supplementary to execution, to set aside as fraudulent a conveyance of real estate, made by the judgment debtor to one of the defendants, and a subsequent conveyance from such grantee, to the other defendant, the judgment debtor is a necessary party. *Shaver v. Brainerd*, 25
5. Whenever it appears that a complete determination of the controversy cannot be had without the presence of other parties, the code makes it the imperative duty of the court to cause the proper parties to be brought in. *ib*
6. And this, although the defect of parties appears upon the face of the complaint, and the defendants fail to demur or to raise the objection in their answer. *ib*

See WITNESS, 1, 2

PARTNERSHIP.

1. Persons giving credit to a firm, supposed to consist of five persons, with-

out any knowledge of two other partners, in the absence of any allegation or proof that the connection of those two with the firm was notorious, or was in any way disclosed, have the right, but are not bound, to sue all the partners. *Brown v. Birdsall*, 549

2. Where one of several partners goes abroad and during his absence an unexpected emergency arises upon which he cannot be consulted, the resident partners have power to make a general assignment of the individual and partnership effects, in trust for the benefit of creditors. *Robinson v. Gregory*, 560

3. An assignment thus executed was sustained, where the absent partner, before leaving for Europe, gave to one of his partners a power of attorney, to execute for him all instruments whatsoever, and all and every act and deed of whatsoever name or nature, appertaining to his affairs; and when informed, by letter, that an assignment had been made, and asked to approve and confirm it, the absent partner expressed no disapprobation of the step which had been taken by his copartners; and he did not join in the application to set the assignment aside. *ib*

PAYMENT.

See PRESUMPTION.

PENALTY.

1. As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose by the statute. *Seward v. Beach*, 239

2. And where a statute imposed a penalty of \$20 for any offense against it—"one half to the complainant, and the other half to the county treasurer of the county of Dutchess, for the benefit of the poor fund of said county," without saying who should sue and bring the action for the penalty; *Held* that an individual bringing an action to recover penalties was bound to show some authority for suing; otherwise he could not recover. *ib*

PLEADING.

See ANSWER.

COMPLAINT.

PRACTICE.

1. Where there is a question as to the credibility of witnesses, and there is evidence in conflict with their testimony, which ought to be submitted to a jury; and where there are exceptions in the case, in regard to the admissibility of testimony; it is improper for the judge, at the circuit, to take the case from the jury and direct a verdict for the plaintiff subject to the opinion of the court at a general term. Such a direction is admissible only when the case presents questions of law alone. *Sackett v. Spencer*, 180

2. Where an action is brought to recover the value of a horse, which the plaintiff claims died of sudden fright, caused by the explosion of a fire cracker thrown under him by the defendant; while the defendant insists that the death of the horse resulted from over-driving, in warm weather; and there is evidence in support of each theory, it is the province of the jury to decide the question in regard to the cause of the animal's death; and they having found a verdict in favor of the plaintiff, the court will not interfere with it. *Conklin v. Thompson*, 218

3. It is amongst the primary and most important duties of the court to order a nonsuit, or to grant a new trial, whenever the evidence is not sufficient to authorize or sustain a verdict. *Per Brown, J. Sheldon v. Hudson River Rail Road Co.*, 226

4. Where there is proof, which, uncontradicted, makes out the fact upon which the recovery depends, on the one side, and there is testimony which tends to disprove its existence, on the other: or when the recovery depends upon the degree of credit to be given to the witnesses on either side, whatever may be the opinion of the judge at the trial, he should not interfere: because these are questions to which the jury alone can respond. *Per Brown, J. ib*

5. But when the evidence is of such a character that the court in bank would be bound to set aside the verdict, (should the jury find one,) as unsupported by the evidence, it is the duty of the court to nonsuit the plaintiff. *Per BROWN, J.* *ib*

6. If a defendant, by any accident or misfortune, has been prevented from appearing at the trial, he should move to have his default opened: or perhaps he might succeed in a motion to set aside the judgment, on the ground that the record does not show a valid recovery. *Per PRATT, J. Pope v. Dinsmore,* 367

7. Although the court might have come to a different conclusion from that of the jury, on the evidence, it is not at liberty, for that reason to disturb their verdict. *Williams v. Vanderbilt,* 491

8. One of two defendants, appearing by a separate attorney and having a separate and different defense, may bring the cause, as to himself, to trial, and in case no one attends for the plaintiff, may take a judgment of dismissal, by default. *Gurnee v. Hoxie* 547

PRESUMPTION.

1. A presumption of payment is not like an actual payment, which satisfies the debt as to all the debtors; it operates as a payment only in favor of the party entitled to the benefit of the presumption. *New York Life Ins. and Trust Company v. Covert,* 435

2. The presumption of payment of a mortgage, arising from the lapse of over twenty years from the time when the mortgage money became due, will not be repelled by proof of a payment made by the mortgagor after he has sold and conveyed the mortgaged premises to another person; so far as the purchaser and those claiming under him, are concerned. *ib*

3. Where a party relies upon the presumption of payment, arising from lapse of time, the proper mode of making the defense is to allege payment, in his answer. *ib*

PRINCIPAL AND AGENT.

Where a complaint alleges that the defendant, while acting as the agent of the plaintiffs, has, with intent to embezzle the plaintiffs' property, fraudulently secreted, made way with, and converted the same to his own use, and in another count it alleges that the defendant, being in possession of the plaintiffs' property as their agent, has converted the same to his own use, it is proper to charge the jury that if they should find that the defendant, under the false pretense of having been robbed, has converted such property to his own use, they may find a verdict for the plaintiff, under either count. *Frost v. McCargar,* 617

PROMISSORY NOTES.

1. Where a promissory note is given up by the holder and destroyed, and a new note, valid and capable of being enforced, is accepted in the place of it, the obligations of the parties upon the former note are satisfied and discharged by the new security. *Sheppard v. Hamilton,* 156

2. But if, for any reason, the new security is void and cannot be legally enforced, the party holding it is remitted back to his original rights, as they existed at the time the new security was taken; for the reason that the new security being abortive, the consideration of the cancellation or satisfaction of the original security or indebtedness fails, and the indebtedness remains unaffected. *ib*

3. Accordingly, where the holder of a new security, which had been substituted in the place of a former one, brought his action upon it, and one of the makers put in a sworn answer, in which he alleged that the new security was void for usury; held that in a subsequent suit brought against him, to enforce his liability upon the original security, he should not be permitted to deny that what he then alleged, on oath, was true; and that if it was true, there was no valid satisfaction of the debt. *ib*

4. An instrument in these words: "Due A. Y., or bearer, three hun-

- dred and forty dollars, for value received, with interest, at L.'s office in Rochester," is a promissory note within the statute; and not being payable at any specified time after date, the maker is not entitled to any days of grace. *Sackett v. Spencer*, 180
5. And being, by its own express terms and legal effect, due and payable at the moment of its execution and delivery, such a note cannot be transferred so as to cut off any defense existing in behalf of the maker at that time. *ib*
6. A certificate, given by the maker of a promissory note, at the time of executing such note, and annexed thereto, in which he states that the note is given for value and will be paid when due, will estop the party giving it from falsifying his own statements, and prevent his setting up the defense of usury against a holder who has discounted the note on the faith of the certificate, giving full value, under circumstances free from suspicion, and without any design to evade the statute. *Mechanics' Bank of Brooklyn v. Townsend*, 569
2. *Held also*, that the defendant had the power to make the contract for the transportation of B. and her baggage, from Toledo to Buffalo; and that the validity of the contract was not affected by the fact that it was to be, in part, performed beyond the territorial limits of the state of Ohio. *ib*
3. The question as to the binding force of the contract, under such circumstances, does not depend upon the state line, but upon corporate power. So long as the existence of the corporation, and power to contract within the limits fixed by its charter are conceded, the same force and effect must be given to its contracts as if it had been created by the laws of this state. *ib*
4. Contracts should be palpably *ultra vires* before they are held to be void for that reason, at the instance of the corporation, as against innocent third persons dealing with it. *ib*
5. Corporations should be restricted, so far as courts can, in the use of their powers, limit them, to the exercise of their legitimate functions; but the plea that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it, is not a gracious one. *Per W. F. ALLEN, J.* *ib*
6. Where corporations owning separate lines of rail road connecting with each other, and forming a continuous route, enter into an arrangement between themselves, by which, at either terminus, passage tickets are sold

R

RAIL ROAD COMPANIES.

1. The defendant was a corporation, created by the laws of Ohio, for the transportation of freight and passengers between Toledo and Cleveland. Between the latter place and Buffalo two other rail road companies were in operation. At Buffalo and Toledo tickets were sold and baggage was checked over the whole route. B. purchased of the defendant's agent at Toledo passage tickets for Buffalo over the three roads, and delivered her baggage to the defendant's baggage agent, who gave her a check entitling her to receive such baggage at Buffalo. In consequence of a detention by storms, the cars did not arrive at Buffalo until late at night, and other trains arriving at the same time, there was an unusual crowd of passengers, and an accumulation of baggage, at the station, and a long time was occupied in delivering the baggage. B., who was

and baggage checked over all the roads, a person purchasing at one terminus a passage ticket over all the roads, and receiving at the same time a check for his baggage over the entire route, may recover of the company of whom such ticket was purchased the value of the baggage, in case the same is lost. *ib*

7. Where a conductor upon a rail road, and his assistants, are sued for assault and battery in forcibly ejecting a passenger from the cars, they cannot be permitted to prove, in their defense, the existence of certain regulations of the rail road company, at the time; that such regulations were reasonable; and that the acts of the defendants, which constituted the assault and battery complained of, were done in conformity with such regulations; unless that defense has been set up in the answer. *Pier v. Finch*, 170

8. In an action against a rail road company, to recover damages for the destruction of the plaintiff's building by fire, through the negligence of the defendant, the plaintiff must show that the act or omission causing the loss was the act of the defendant; and that such act or omission was a negligent one. *Sheldon v. Hudson River R. R. Co.*, 226

9. What facts are necessary to be proved to establish the charge of negligence, in such a case. *ib*

10. It is not enough for the plaintiff to show a possibility that the fire was communicated to the building by sparks from the defendant's locomotive. *ib*

11. The plaintiff cannot recover upon a possibility; nor even upon a probability. To justify a verdict, the law requires such proof as will leave no reasonable doubt of the existence of the fact upon which it must rest. *ib*

12. Where an individual who had shipped cattle for transportation upon a rail road was riding free in one of the cars of the company, for the purpose of taking charge of the cattle, under an agreement by which he assumed to do so at his own "risk of personal injury from whatever cause," and by virtue of a passage

ticket having a notice indorsed thereon, stating that he assumed "all risks of accident," and agreed that the company should not be liable, "under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person" &c., and was killed by means of a collision between two trains of cars, through the gross negligence of the agents and servants of the company; *Held* that the injury arose from a cause not within the risk, and constituted a good cause of action in favor of the administrator of the deceased, against the company. *Bissell v. The New York Central Rail Road Co.*, 602

13. *Held also*, that neither the contract, nor the ticket, could be construed as referring to injuries resulting from negligence criminal in its nature, and which would have subjected the guilty agent to indictment and punishment under the statute. *ib*

14. Under the provision of the statute, requiring rail road companies to erect and maintain fences on the sides of their roads, if a fence is thrown down, or blown down, or becomes defective from any cause, it becomes the duty of the rail road company to restore it within a reasonable time. *Munch v. New York Central Rail Road Company*, 647

15. And though a fence is thrown down, and an opening left therein, by a trespasser, yet if it is suffered to remain in that condition an unreasonable length of time, a jury has a right to find that this is negligence in the rail road company. *ib*

16. When a rail road company is in default, for not repairing a gap in a fence, and a horse passes through the gap, upon the rail road track, and is there killed, the mere negligence of the owner in permitting the horse to run at large, in the highway, or to trespass upon a neighbor's premises, will not constitute a defense to an action against the rail road company, to recover the value of the horse. *ib*

See CARRIERS.

CONSTITUTIONAL LAW, 4.
DAMAGES, 5.

RECEIVER.

1. A receiver may maintain an action against the judgment debtor, of whose property he is appointed receiver, for a conversion thereof, where the debtor has converted the same after it became vested in the receiver. *Gardner v. Smith*, 68
2. But for a refusal to surrender a mere possession, to which neither the debtor nor the receiver has any legal right, and which the debtor holds only by sufferance, no action will lie by the receiver. *ib*
3. Where a judgment debtor, at the time of the appointment of a receiver of his property, is in possession of personal property upon which he has given a mortgage to the former owner, to secure the purchase money, which mortgage is then in force, but the receiver neglects to pay it off when it becomes due, and suffers the right of the mortgagee to become absolute, he cannot, after a demand of the possession of the debtor, and refusal, maintain an action against the latter, for a conversion of the property. *ib*
4. Where, in an action of that nature, the defendant alleges, in his answer, that he was not, at the time of the alleged conversion, the owner of the property, the mortgage so given by him, upon the property, is admissible in evidence, in support of that defense; notwithstanding the objection that a true copy thereof was not filed, with a statement exhibiting the interest of the mortgagee, in the property, according to the statute, and that it is consequently void as against the creditors of the mortgagor. *ib*
5. Receivers, appointed in other states, may sue as such, in the courts of this state. *Runk v. St. John*, 585

RELIGIOUS SOCIETIES.

1. Individuals claiming to be trustees *de facto* of a religious society which has never been incorporated, cannot maintain an action against persons who are in the actual possession of land and the house of worship erected thereon, under a claim that they

are trustees of, and represent, an incorporated society which owns the same; for the purpose of having the plaintiffs declared to be legal trustees of the society and the successors in office of the grantees named in the original deed of the land; and to have the plaintiffs, and those who adhere to, and act with them, declared to be the true and legitimate society, and entitled to the use, enjoyment and occupation of the house of worship; and to compel the defendants to surrender the possession thereof to the plaintiffs and account for the use and occupation; and that whatever the defendants and their associates may have done towards being incorporated, may be declared null and void; on the ground that the plaintiffs truly represent the religious faith of those who took the deed of the lot from the original grantor and erected the house of worship thereon. *Bundy v. Bird-sall*, 31

2. Trustees of religious societies cannot sue, as such, except by the corporate name or title of the society. *ib*
3. A deed of land, to trustees *de facto*, of an unincorporated religious society, conveys no title to the society. *ib*
4. Upon the authority of *Robertson v. Bullions*, (1 Kern. 243,) the right of a majority of the corporators of a religious society to change their form of church government, and pass from a congregational church to an organization in connection with the presbyterian body, is unquestionable. *Parish of Bellport v. Petty*, 256
5. Where, in an action to recover the possession of a lot of land and a church edifice erected thereon, four of the persons named as plaintiffs, in connection with the religious corporation, and claiming to be trustees of such corporation, deduced their title to their office as trustees, from a meeting held by that portion of the corporators who adhered to the congregational organization, at which four trustees were elected—two to fill vacancies occasioned by the expiration of official terms, and two to supply the places of those who united with

that part of the corporation in connection with the presbyterian organization—and from the time of their election to the commencement of the suit they had not had possession or control of the church edifice or corporate property, and except for a very brief season had been excluded therefrom, and from the exercise of all functions, as officers of the corporation; and on the other hand the defendants deduced their title as trustees, by regular succession and election, from the time of the incorporation of the society down to the time of the commencement of the action; and during all this time they and their predecessors had been in the actual possession of the church edifice and property, holding it for the corporation and its members, and exercising without interruption the usual functions of corporation officers; *Held* that the defendants were the rightful trustees of the corporation. *ib*

6 And it being manifest, from the pleadings, that the title to the lands and church edifice was not put in issue, nor the right to the possession, but only the title to the office of trustees of the religious corporation; *Held* further, that as soon as it appeared, upon the trial, that the defendants were in possession of the premises in dispute, holding them from the religious corporation under color of an election apparently regular, held in conformity with the statute, the plaintiff should have been nonsuited. *ib*

7. In an action of ejectment, brought in the name of a religious corporation and by persons claiming to be trustees of the corporation, to recover the church edifice and land, on the ground that the corporation is the owner in fee, and entitled to the possession, from which it has been wrongfully excluded by the defendants, the right to the office of trustees, as between the plaintiffs and defendants, cannot properly be entertained and determined. *ib*

8. No two issues can possibly be more incongruous than one upon the title of a corporation to a piece of land and the title of a class of persons to administer its affairs as its directors and officers. *Per BROWN, J. ib*

RENT.

See LANDLORD AND TENANT.

RES ADJUDICATA.

See MORTGAGE, 7.

REVIVOR.

An order of revivor, standing in full force, at the trial, is conclusive to show that the action has been properly revived in the name of the person therein mentioned as plaintiff; and that a recovery can be had in his name. *Underhill v. Crawford*, 664

S

SET-OFF.

See COUNTER CLAIM.
JUSTICES' COURTS, 4.

SHERIFF.

A sheriff of this state has no power to sell upon an execution issued on a judgment recovered here, in an attachment suit, the real estate of a foreign corporation, situated in another state. *Runk v. St. John*, 585

SUPREME COURT.

1. A decision made by the supreme court, at a general term, held in one of the districts, should be respected by the courts in other districts, unless in some special case, and for special reasons, a court feels compelled to depart therefrom. *Per INGRAHAM, J. Andrews v. Wallace*, 350
2. And two successive decisions, concurring on the same point, made at general terms in different districts, should be treated as authority, in other districts, until reversed by a higher tribunal. *Per INGRAHAM, J. ib*

SURROGATE.

1. Where a claim against an estate is disputed by the executor or administrator, the surrogate has no jurisdiction to try the validity of such

claim, on the petition of the creditor. *Andrews v. Wallace*, 350

2. The sole object of appointing a special collector, by the surrogate, is the preservation of the property, and the collection of the debts. Such collector has no authority to pay debts, or make any disposition of the funds, except to pay his own expenses in collecting and preserving the property of the estate. *Master of the estate of Parish*, 627

3. And an order of the surrogate, made on admitting a will to probate, by which he directs that the costs and expenses of the parties, to be certified and allowed by the surrogate, be paid out of the estate, is to be construed as contemplating a payment to be made by the executor, in the due course of administration, and is no authority to the special collector to make any payments. *ib*

4. The contestants, either for or against a will, have no claim to be paid out of the estate, until a final decision is made, so as to take the property out of the hands of the special collector; and an order directing him to pay costs and expenses to the litigants is erroneous, and should be reversed. *ib*

T

TENANTS IN COMMON.

1. Where two tenants in common of chattels unite in an action for the conversion thereof, one cannot release, discharge or settle the action, so as to defeat the rights of the other to proceed and recover his portion of the damages. *Gock v. Keneda*, 120

2. If one of the plaintiffs settles the action, without the consent of the other, and executes a release to that effect, *it seems* the action may proceed in the name of both plaintiffs, for the benefit of the one not releasing; or an amendment can be made, striking out the name of the other. *ib*

TOWNS.

See ACTION, 1.

CONSTITUTIONAL LAW, 4 to 8.

TRESPASS.

1. The provisions of the statute "Of trespass on lands," (2 R. S. 338, § 1,) were not intended exclusively for the benefit of persons having a present estate in possession. *Van Deusen v. Young*, 9

2. Remaindermen in fee may maintain an action, under the statute, for an injury to the inheritance, by cutting timber; and the fact that there is a subsisting estate for life in another person presents no insuperable obstacle to such action. *ib*

3. What cases, upon the merits, or judged by the intrinsic character of their facts, are embraced within the statute. *ib*

4. Where a contract for the sale and purchase of land is made, under which the purchaser enters into possession of the premises, and cuts wood and timber thereon, and the contract is subsequently terminated without a consummation by deed, and it does not appear whether it was put an end to by mutual consent, or mutual fault, or which party committed the fault, the parties are remitted to their original rights, and an action may be maintained, under the statute, for the injuries done to the inheritance by the purchaser. *ib*

TRUST.

1. The plaintiff held certain promissory notes made by C., and the defendant guarantied the payment thereof. C. becoming insolvent, made an assignment of all his property, to the defendant and others in trust, for the payment of his debts, which instrument contained a direction for the payment to the defendant of whatever sum he might or should pay in consequence of the said guaranty. Judgment was subsequently recovered against the defendant, upon his guaranty, and an execution issued thereon was returned unsatisfied. *Held* that as

soon as the defendant's liability to pay the plaintiff became *fixed* by the judgment against him, it was the right of the plaintiff, in equity, to have the fund provided by the principal debtor applied in its payment; and that the assignees of C. could not divert that fund to any other purpose. *Martin v. Campbell*, 188

2. *Held also*, that the defendant being himself the trustee, or one of the trustees, and having the funds in hand to meet the sum due upon the guarantied debt, was bound in equity, in conjunction with his co-assignee, at once to apply them for that purpose; and that he could not be permitted to put his creditor at defiance on the ground of his personal inability to pay the debt, in the first instance, from his own means. *ib*

See WILL.

U

USURY.

1. Where a loan is made in the state of Connecticut, at a greater rate of interest than is allowed by the laws of this state, but no greater than the legal rate in Connecticut, the fact that the note given by the borrower, for the amount of the loan, is made payable in this state, will not render the transaction usurious and the note invalid. *City Savings Bank v. Bidwell*, 325
2. In an action here, upon such a note, the contract will be treated as a foreign contract, and the burthen of proof is upon the defendant, to show that the transaction is contrary to the laws of Connecticut. *ib*
3. A creditor, who has agreed with the principal debtor, without the consent of a surety, to extend the time of payment of the debt, for a usurious consideration paid at the time, cannot avail himself of the usury, as rendering the agreement invalid, when the agreement, and the usurious consideration, are proved by the surety for the purpose of establishing a defense that he is discharged from his liability. *Johnson, J. dissented. Draper v. Trescott*, 401
4. Where accommodation paper is bought *bona fide* for a gross sum, which sum, on calculation, gives more than seven per cent, the transaction is usurious, and no recovery can be had against the parties to the note, for the amount actually paid, with lawful interest; if there has been no fraud or false representation, by certificate or otherwise, to mislead the purchaser. *Bossange v. Ross*, 576
5. *It seems* there is no real distinction—so far as usury in its civil aspect is concerned—between buying and discounting; the policy of the statute being equally defeated by the one as by the other. *ib*

See PROMISSORY NOTES, 6.

V

VENDOR AND PURCHASER.

1. Of land.

1. Time is of the essence of an agreement for the sale and purchase of real estate; and if the execution of the contract is suspended for ten years, without any fault on the part of the purchaser, he will not be compelled to fulfill it. *Tompkins v. Seely*, 212
2. On the 8th of December, 1847, S. entered into an agreement with H. for the purchase of lands; the time appointed for the payment of the purchase money and the delivery of the deed being the 1st of April, 1848. H. died in March, 1848, leaving infant heirs, and leaving the contract unexecuted. S. entered into possession of the property, and made improvements thereon. And he, after the death of H., united with H.'s administrator in an application to the court for its aid to carry the contract into effect, and deposited with a trust company the sum of \$1500, on account of the purchase money, to be paid over whenever a conveyance of the property should be effected. This sum was subsequently paid over to the administrator of H., under an order of the court. *Held*, that S. had exhibited substantial evidence of his willingness and readiness to perform his part of the agreement; and no valid deed having been ten-

- dered by the heirs of H. within ten years from the date of the contract ; *Held further*, that even if the heirs were now capable of performing the stipulations of the agreement, S. and those claiming under him, were entitled to be relieved from its obligations, after such a lapse of time, and to have whatever they had paid, on account of it, refunded to them. *ib*
3. *Held also*, that S. had an equitable right to look to the property for the reimbursement of the \$1500 paid over to the heirs of H., if such heirs failed or were incapable of performing the agreement of sale within a reasonable time ; and that he had an equitable lien upon the land, to that extent. *ib*
4. *Held further*, that an assignee of S.'s interest in the contract succeeded to all the rights in the contract, and to the money paid under it, that S. possessed. *ib*
5. And that when such lands were about to be sold, under a prior mortgage, such assignee had such an interest in the subject as entitled him to pay the amount due upon the judgment of foreclosure, and to be subrogated to all the rights of the mortgagee. *ib*
6. A sale of land may be made as well by an executory contract as by a deed of present bargain and sale. *Demarest v. Ray*, 563
7. A testator, by his will, authorized his executors, if they should think it advisable, "to sell such number of lots, not exceeding twenty," of 25 by 100 feet, as might be necessary to pay charges and assessments. *Held* that an executory contract, by the executors, for the sale of lots, was authorized by the will, and was, to the extent of the number of square feet embraced in it, and subject to the contingency of its possible non-fulfillment, an execution of the power ; especially if the vendee was let into actual possession, and subsequent purchasers were duly informed of the facts. *ib*
8. The deed, in such a case, when delivered, relates back to the contract, and has the same effect against subsequent purchasers with notice, as if it had been delivered on the day of the sale. *ib*
9. When subsequent purchasers know that the power of the executors has been conditionally exhausted, they take their deeds subject to the chance of their being in part inoperative, in case the sales made to their predecessors shall be consummated by a fulfillment of the conditions. *ib*
2. *Of chattels.*
10. In an action on an executory contract for the sale and purchase of stock in an incorporated company, by the vendor, the purchaser may show, in his defense, that at the time of making the contract, the charter of the company, and all its privileges, had, without his knowledge, been revoked and annulled, and the company itself been dissolved and abolished. *Kip v. Monroe*, 579
- See DEBTOR AND CREDITOR, 1, 2.
HUSBAND AND WIFE, 7.

W

WILL.

1. A testator, after giving directions as to the payment of his debts, the disposition of his business, the conversion of his estate into money, and investing the same on bond and mortgage, and for the payment of certain legacies after the expiration of one year from the time of his death, by the 10th clause of his will, directed that the remainder of his estate, and the accumulations thereof, should be held, used and managed by his executors for the benefit of such of his three younger children, R., M. and A., as should be living at the time of his death. And if the said children should have attained the age of 21 years at the time of his decease, then his executors were to pay over the remainder of the funds, and all accumulations thereon, to his said three younger children or to the survivor of them, (if one of them should then be dead,) in equal proportions, share and share alike. And if there should be but one survivor at the time of his decease, then the

executors were to pay over the remainder of the funds and all the accumulations thereon, to his said three younger children or to the survivors of them, (if one of them should then be dead,) in equal proportions, share and ~~ver~~ alike. And if there should be but one survivor at the time of his decease, then the executors were to pay over to such survivor the whole of such funds, and the accumulations thereon. The testator then directed that if he should depart this life while any of the said younger children should be under the age of 21 years, the executors should hold, use and manage the said residue and remainder of the trust funds, as before provided, until all of his said three younger children, or the survivor or survivors of them, should become of age; and then he directed his executors to pay over such funds, and the accumulations, to them or to the survivors of them, in the same manner and in the same proportions as before provided in case of his not dying until after the youngest one living at the time of his decease should become of age. The testator died before either of the three younger children attained the age of 21. *Held* that the trust created by the 10th clause of the will was of the entire estate, and not a trust of each of its three separate parts. And that the absolute power of alienation being by possibility suspended for a longer period than two lives, the whole limitation was void. *Everitt v. Everitt*, 112

See VENDOR AND PURCHASER, 7.

WITNESS.

1. The fact that the defendant is a corporation, and therefore cannot be examined as a witness in its own be-

half, will not prevent the plaintiff from offering himself as a witness, and being examined, in support of his claim. *Field v. New York Central Rail Road Company*, 176

2. The provision of the code, that "whenever a party or person in interest has been examined" as a witness under the 399th section, "the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received," should be construed to extend only to cases where the party against whom the other party has been examined is a natural person, capable of giving evidence, and a competent witness, provided he had not been a party or person in interest. *ib*
3. A witness may be allowed to refer to his cash book, to refresh his recollection; but after having sworn positively, he cannot refer to his cash book for the purpose of corroborating his testimony. *Sackett v. Spencer*, 180
4. The settled rule in this state now is, that where the veracity of a witness is attacked and he is sought to be impeached, only by proof of contradictory statements made by him on other occasions, in respect to the same matter, or by proof of particular facts, stated by such witness, against himself, on his examination, evidence of general good character, or of good character for truth and veracity, in support of the witness, is inadmissible. *Frost v. McCargar*, 617

WORK AND LABOR.

See AGREEMENT, 1, 2, 3.

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